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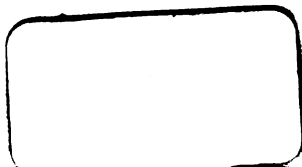
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BRADBURY'S
PLEADING AND PRACTICE
REPORTS

**CONTAINING SELECTED CASES WITH FORMS OF COM-
PLAINTS, ANSWERS, DECREES, ORDERS, AFFIDA-
VITS AND OTHER IMPORTANT DOCUMENTS,
ALSO CHARGES OF TRIAL JUDGES, AND
EXHAUSTIVE NOTES ON THE LEGAL
POINTS INVOLVED**

EDITED BY
HARRY B. BRADBURY
OF THE NEW YORK BAR

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BRADBURY'S PLEADING AND PRACTICE REPORTS

VOL. 3

LOUIS LEVY, Plaintiff, *v.* MODE EMBROIDERY WORKS and
ISIDORE A. WIENER, Defendants

(City Court of the City of N. Y., December 4, 1912)

Code Civ. Pro., § 1778; serving answer in action on promissory note against corporation in City Court of New York without order for trial of issues; waiver of irregularity by retention of answer; time within which judgment may be entered upon failure to serve order ¹

1. In an action on a promissory note against a corporation, the provisions of § 1778 of the Code of Civil Procedure that an order for the trial of the issues must be served with an answer or demurrer, is waived, where an answer which is served without such an order is retained by the plaintiff's attorney.
2. Where an answer is served without an order for the trial of the issues in such an action in the City Court of the City of New York, judgment cannot be entered in any event until the expiration of twenty days after the service of the complaint.

Kogan & Goldstein for the plaintiff.

Jacob Cebulsky for the defendant, Mode Embroidery Works.

¹ See *Smith v. Consumers' Fertilizer Co.*, *post*, page 2, note. See also NOTE ON PRACTICE UNDER § 1778 OF THE CODE OF CIVIL PROCEDURE, *post*, page 3.

GREEN, J.:

This is a motion to vacate a judgment and execution issued thereon as a matter of right. The action is brought against a corporation upon a promissory note made by the defendant. Defendant served its answer and neglected to obtain an order under § 1778 of the Code directing the issues to be tried, and judgment was thereupon entered. Plaintiff did not return the answer, but retained it and entered judgment. I have had occasion to pass upon this same question before, and the case of *Smith v. Consumers' Fertilizer Co.* (L. J., April 14, 1910) ¹ presents

¹ As the case of *Smith v. Consumers' Fertilizer Co.* referred to in the text is not elsewhere reported it is printed below in full:

GREEN, J.:

This is a motion to vacate and set aside a judgment and execution issued thereon upon the ground that judgment was improperly entered against the defendant. The action is predicated upon a promissory note allegedly made by the defendant, a corporation. The summons and complaint was served on March 15, 1910, and an answer served upon plaintiff's attorney within six days. Defendant's attorney through inadvertence failed to obtain and serve an order as required by § 1778 of the Code of Civil Procedure that the issues presented by the pleadings be tried and plaintiff's counsel, electing to treat the answer as a nullity as provided by the Code, entered judgment and issued execution. There are two serious objections to the maintenance of the judgment as entered and upon which execution was issued. The summons and complaint were served on March 15, 1910, and consequently, even though no order was obtained directing that the issues presented by the pleadings be tried, the plaintiff was not entitled to enter judgment under § 1778 of the Code until "at the expiration of twenty days after the service of a copy of the complaint." The summons and complaint having been served on March 15, the first day upon which plaintiff had the right to enter judgment was April 4, yet plaintiff entered judgment and the same was docketed on April 1, three days prior to the time he had the right to do so. The second objection is the fact, as contended by defendant's counsel, that plaintiff retained the answer and consequently did not treat it as a nullity, and thus has waived the provision of § 1778 of the Code. This section has long been a hidden trap for the unwary. It is a senseless provision of the Code and serves no useful purpose. In dealing with this section with that thought in mind the courts have held that a retention of the

Note on Practice under Code Civ. Pro., § 1778

the reasons why this motion must be granted. Plaintiff had no right to retain the answer; if he desired to take advantage of the section he was under duty to return it with his reasons, and in addition he had no right to enter judgment, as in case of default, until twenty days after the service of the complaint. This period had not elapsed, consequently plaintiff's action is without warrant in law. While there has been some conflict in regard to the proper practice in cases of this kind, the question seems in this department to be settled in the manner indicated. (For other cases upon this subject see Bench & Bar, March, 1911, p. 118.) The motion to vacate the judgment and the execution thereon is granted, with \$10 costs and the additional amount of the sheriff's fees required to release the levy.

NOTE ON PRACTICE UNDER SECTION 1778 OF THE CODE OF CIVIL PROCEDURE

Section 1778 of the Code of Civil Procedure has been the subject of considerable adverse criticism by the courts. Nevertheless was a waiver to that provision of the Code. Counsel for defendant cites the case of *Watertown National Bank v. Westchester County Water Works*, 19 Misc. 685; 44 Supp. 1101; a Special Term decision of Mr. Justice Hiscock, then at Onondaga County Special Term, Supreme Court, in support of his judgment; but the case of *Blenderman v. Bellis Co.*, 64 Misc. 65; 117 Supp. 897; and *Tautphoeus v. Harbor & Suburban Co.*, 96 App. Div. 23; 88 Supp. 709; are directly in conflict with that decision, and in my opinion are controlling on this motion. In the *Tautphoeus* case, *supra*, the Appellate Division in a unanimous decision held that the retention of the answer precluded the plaintiff from treating it as a nullity, and that defendant had a right to assume that it had been properly served. I am therefore of the opinion that the judgment was improperly entered, firstly because it was entered before the expiration of twenty days from the day of service of the summons and complaint, and secondly because by retaining the answer plaintiff waived the provision of § 1778 of the Code and thereby was precluded from treating the answer as a nullity.

The motion to vacate the judgment and execution is thereby granted as a matter of right, with \$10 costs of this motion, and the sheriff is stayed from any and all proceedings therein.

Note on Practice under Code Civ. Pro., § 1778

theless the Legislature has not seen fit to repeal it. There has also been a good deal of conflict relating to practice thereunder.

In spite of one or two very respectable authorities to the contrary, it is believed that the decisions made by Mr. Justice GREEN on the two points involved in the cases of *Levy v. Mode Embroidery Works*, at page 1 of the text, and *Smith v. Consumers' Fertilizer Co.*, in a note at page 2, are sound.

The section has not been changed since it was originally enacted as part of the Code and reads as follows:

"In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note, or other evidence of debt, for the absolute payment of money, upon demand, or at a particular time, an order, extending the time to answer or demur, shall not be granted, except by the court, upon notice to the plaintiff's attorney. In such an action, unless the defendant serves, with a copy of his answer or demurrer, a copy of an order of a judge, directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading, at the expiration of twenty days after service of a copy of the complaint, either personally with the summons, or upon the defendant's attorney, pursuant to his demand therefor; or, if the service of the summons was otherwise than personal, at the expiration of twenty days after the service is complete."

The section is constitutional. *Moran v. Long Island City*, 101 N. Y. 439; rev'g 38 Hun, 122.

It has been held that the Statute should not be extended beyond the strict limitations of the terms employed. *Shorer v. Times Printing & Publishing Co.*, 53 Hun, 88; 6 Supp. 63; aff'd 119 N. Y. 483.

Section 1778 does not apply to an action against a corporation, as an endorser on a promissory note; it is to be confined strictly to actions upon instruments which admit on their face an existing debt payable absolutely. *Shorer v. Times Printing & Publishing Co.*, 119 N. Y. 483; aff'g 53 Hun, 88; 6 Supp. 63.

When an endorser of a promissory note made by a corporation paid the note and took it up and subsequently sued thereon, and the defendant served a demurrer to the complaint without an order under § 1778 that the issues be tried, it was held that the plaintiff was entitled to enter judgment as upon a default

Note on Practice under Code Civ. Pro., § 1778

at the expiration of twenty days from the service of the summons and complaint. *Ford v. Binghamton Hydraulic Power Co.*, 54 Hun, 451; 7 Supp. 714; aff'd 121 N. Y. 664.

Section 1778 does not apply in an action on a promissory note against a corporation where the defendant admits the making of the note, but sets up a counterclaim. *Pennypacker v. Levis & Co.*, 63 Misc. 384; 116 Supp. 771.

It seems that a policy of fire insurance under which a loss has occurred, is not an instrument for the payment of money within the meaning of § 1778 of the Code. *Trepagnier & Bros. v. Rose*, 18 App. Div. 393; 46 Supp. 397; aff'd 155 N. Y. 637.

A policy of life insurance, although it has matured and become payable, is not an evidence of debt for the absolute payment of money on demand, within the meaning of Code Civ. Proc., § 1778. *New York Life Ins. Co. v. Universal Life Insurance Co.*, 88 N. Y. 424; *McKee v. Metropolitan Life Ins. Co.*, 25 Hun, 583; *Anonymous*, 6 Cow. 41; *Tyler v. Aetna Fire Insurance Co.*, 2 Wend. 280.

A certificate of stock of a building and loan association, with a guaranty of payment of the principal thereof, which must be reformed as to its date, is not an evidence of debt for the absolute payment of money within the meaning of § 1778. *Tautphoeus v. Harbor & Suburban B. & S. Assn.*, 96 App. Div. 23; 88 Supp. 709.

Section 1778 applies to an action brought on the interest coupons from bonds issued by a Municipal Corporation. *Moran v. Long Island City*, 101 N. Y. 439; rev'g 38 Hun, 122.

Under the provision of § 20 of the Municipal Court Act, § 1778 of the Code of Civil Procedure applies to an action in the Municipal Court against a corporation. *Duke v. Mt. Morris Construction Co.*, 127 App. Div. 39; 111 Supp. 313.

In an action brought in the Municipal Court of the City of New York, where the answer is not served on the plaintiff, but is filed in the court, the plaintiff must object promptly when his attention is called to the fact that the answer has been served without such order; it will be too late to raise the objection on the day of the trial, where there have been several adjournments after the filing of the answer. *Blenderman v. J. R. Bellis Co.*, 64 Misc. 65; 117 Supp. 897.

Section 1778 of the Code of Civil Procedure does not apply to

an action brought in a Justice's court against a domestic corporation. *Center v. Hoosick River Pulp Co.*, 43 Misc. 247; 88 Supp. 548.

An order under § 1778 that the issues be tried does not prejudice the right of the plaintiff to make such motion on the pleadings as he may be advised. *Beaumont v. Dieck's Pharmaceutical Extract Co.*, 5 Civ. Pro. R. 274.

In an action on a promissory note where an order has been secured under § 1778 in relation to the original complaint it is not necessary to secure a new order upon the service of an amended complaint. *Edward Barr Co. v. George M. Kuntz & Co.*, 18 Abb. N. C. 476, City Court of N. Y., McADAM, Ch. J.

On the two points decided by Mr. Justice GREEN in the cases in the text and a note thereto, it has been held by Mr. Justice HISCOCK, sitting at the Onondaga County Special Term of the Supreme Court, that the retention of an answer served by the defendant without an order for the trial of the issues, did not constitute a waiver of the irregularity. *Watertown National Bank v. Westchester County Water Works Co.*, 19 Misc. 685; 44 Supp. 1101.

But the last mentioned case has, in effect, been overruled by the Appellate Division of the First Department, holding that where an answer is served by the defendant without the order required by Code Civ. Proc., 1778, and the answer is retained by the plaintiff, the plaintiff is precluded from treating the answer as a nullity. *Tautphoeus v. Harbor & Suburban B. & S. Assn.*, 96 App. Div. 23; 88 Supp. 709. The court further held that if the plaintiff desired to take advantage of the irregularity he must return the answer promptly with a notice stating the reasons for such return.

On the question of whether the plaintiff must wait twenty days, or a shorter period, before taking judgment, when the action is brought in a court where the time to answer the complaint is less than twenty days, there is also much conflict.

There is a *dictum* in the case of *Center v. Hoosick River Pulp Co.*, 43 Misc. 247; 88 Supp. 548, to the effect that when an action is brought in a court where the summons requires an answer to be served in less than twenty days that the order specified in Code Civ. Pro., § 1778, must be served within the time that the defendant has to answer. In support of that doctrine the court

Note on Practice under Code Civ. Pro., § 1778

cited the cases of *Donaldson v. Wood & Wood*, 22 Wend. 395; *Schlegel v. American Beer & Ale Bottling Co.*, 12 Abb. N. C. 280. The *Schlegel* case supports the ruling, but the case of *Donaldson v. Wood & Wood* is on an entirely different point and it is difficult to understand how it can be an authority for such a doctrine, except on the general principle that courts will look to the circumstances and conditions under which a statute was passed to determine the intent of the legislature.

In the New York Marine Court (now City Court) it was held that the order under § 1778 should be served within six days after the service of the summons and complaint (1882). *Schlegel v. American Beer & Ale Bottling Co.*, 2 Civ. Pro. 393; 12 Abb. N. C. 280.

The provisions of § 1778 are plain however that the plaintiff must wait *twenty* days in such a case before taking judgment. Mr. Justice GREEN seems, therefore, to have the better of the argument in support of the decisions made in the case of *Levy v. Mode Embroidery Works* (at page 1 in the text) and the case of *Smith v. Consumers' Fertilizer Co.* (in a note at page 2). The same Justice made another decision to the same effect in the case of *Barrett v. Granite Springs Water Co.* (unreported) City Court of the City of New York, Dec. 5, 1912.

CHARLES M. PEABODY et al., Respondents, v. RICHARD
REALTY COMPANY et al., Appellants ¹

(207 N. Y. 642; aff'g without opinion 145 App. Div. 903; 129 Supp.
1139; aff'g without opinion 69 Misc. 582; 125 Supp. 349)

Guaranty; bond of surety company conditioned that tenant will
perform covenants of lease; action on bond for liquidated dam-
ages ²

Appeal from a judgment of the Appellate Division of
the Supreme Court in the Fourth Judicial Department,
entered May 3, 1911, affirming a judgment in favor of
plaintiffs entered upon a decision of the court on trial at
Special Term.

Frank M. Avery, Edgar J. Phillips and Earl A. Darr
for appellants.

Vernon Cole and Moses Shire for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN,
WERNER, CHASE and COLLIN, JJ.

¹ For complaint from this case see *post*, page 9, to which is added
the bond on which the action was founded.

The only opinion written in the case was that of Mr. Justice MARCUS
at Special Term (69 Misc. 582; 125 Supp. 349), who held that while
actual damages were proved in excess of the penalty of the bond, that
even if there had been a failure of such proof the plaintiff would still
have been entitled to have recovered the amount of the penalty as
liquidated damages.

² See NOTE ON ENFORCING CONTRACTS FOR LIQUIDATED DAMAGES,
post, page 16.

Complaint

Form No. 1

**Complaint; Guaranty; Bond of Surety Company Conditioned that
Tenant will Perform Covenants of Lease; Action on Bond for
Liquidated Damages¹**

Supreme Court, Erie County.

Charles M. Peabody, Elizabeth
Peabody King and Eliza M.
Peabody, as Committee of the
Property of William H.
Peabody, an incompetent
person,

Plaintiffs,

against

Richard Realty Company and
National Surety Company,
Defendants.

The above named plaintiffs, by Shire & Jellinek, their attorneys, for their complaint herein, allege:

I. That during all the times hereinafter mentioned, the above named defendants were and still are domestic corporations.

II. That heretofore and on the 30th day of March, 1909, the plaintiff, Eliza M. Peabody, was, by an order made at a Special Term of the Supreme Court of the State of New York, and which was duly entered in the office of the Clerk of the County of Erie on the 31st day of

¹ From *Peabody v. Richard Realty Co.*, 607 N. Y. 642; aff'g without opinion 145 App. Div. 903; 129 Supp. 1139; aff'g without opinion 69 Misc. 582; 125 Supp. 349.

See *ante*, page 8.

FOR NOTE ON ENFORCING CONTRACTS FOR LIQUIDATED DAMAGES
see *post*, page 16.

Complaint

March, 1909, duly appointed Committee of the Person and Property of one William H. Peabody, who was therein and thereby declared and adjudged to be an incompetent person, and the said Eliza M. Peabody duly complied with all of the terms and conditions of the said order and gave the bond required by law and by said order, and which said bond was duly approved and filed and recorded in Erie County Clerk's office, and said Eliza M. Peabody duly qualified as such Committee and ever since the filing of said bond, has been and is now acting as such Committee, and that on the 27th day of May, 1910, an order was duly granted by the Supreme Court of the State of New York, at a Special Term thereof, held in and for the County of Erie, and the said Eliza M. Peabody, as Committee of the property of William H. Peabody, was duly authorized and permitted to bring and maintain this action, and the said order was duly filed in Erie County Clerk's office.

III. That heretofore and on the 16th day of July, 1904, Elizabeth Peabody King and Charles Mason Peabody, as Executrix and as Executor of the Last Will and Testament of one William H. Peabody, being the owners of certain premises situate in the City of Buffalo, New York, and being the premises situate on the northwest corner of Main and Chippewa Streets in said City, having a frontage of about one hundred and eighty-five feet on Main Street and extending through to Pearl Street, with a frontage on Pearl Street of about one hundred and eighty-five feet, entered into an agreement in writing with the defendant, Richard Realty Company, whereby they leased and demised to said Richard Realty Company, the said premises, for the term of ten years, to commence on the first day of May, 1905, and to end on the first day of May, 1915, and which among other things, provided for the payment by the said Richard Realty Company to the said Charles Mason Peabody and Elizabeth Peabody King, as Executor and Executrix of the Last Will and Testament of William

Complaint

H. Peabody, deceased, of certain rentals, as follows: The rental of Twenty-four thousand dollars for the first and second years of the said term; the rental of Twenty-three thousand dollars for the third year of said term; the rental of Thirty-two thousand dollars for the fourth year of said term; the rental of Thirty-two thousand dollars for the fifth year of said term; the rental of Thirty-four thousand dollars for the sixth year of said term, and the rental of Thirty-six thousand dollars per annum for the balance of said term, which said rental was payable in equal monthly payments in advance.

IV. That after the making of said lease, the same was duly transferred and assigned to the Peabody Realty Company, by an instrument in writing, and the said premises were also conveyed by said Executrix and said Executor to the said Peabody Realty Company on or about the said time. That said Peabody Realty Company was a domestic corporation, and by virtue of said written assignment, it became possessed of all the right, title and interest of the said Executrix and Executor in and to the said lease, and also in and to all rent then due or which might thereafter become due under the said lease, and "that thereafter and on or about the 8th day of May, 1907, the said defendant Richard Realty Company, as Principal, and said defendant, National Surety Company, as Surety, made, executed and delivered their obligation or bond in writing unto the said Peabody Realty Company, in the sum of Ten thousand dollars, providing and conditioned, among other things, that if the said Richard Realty Company should fail to perform any of the terms of the said lease on its part to be performed, and was dispossessed from said premises by reason of its non-performance of any conditions, that the said defendants would pay to the said Peabody Realty Company the sum of Ten thousand dollars as stipulated and liquidated damages, and not as a penalty." That a copy of said bond or undertaking is hereto attached, marked Exhibit

Complaint

"A," and is hereby referred to and made a part of this complaint.

V. That thereafter and on or about the 23d day of June, 1909, said Peabody Realty Company, by an instrument in writing, duly transferred, set over and assigned unto Charles M. Peabody, William H. Peabody and Elizabeth Peabody King all of its right, title and interest in, to and under the aforesaid lease, and also all rent then due or which might thereafter become due under the said lease, and also conveyed the premises described in said lease to Charles M. Peabody, William H. Peabody and Elizabeth Peabody King, and likewise, on said date, duly transferred, set over and assigned unto Charles M. Peabody, William H. Peabody and Elizabeth Peabody King all of its right, title and interest in, to and under the aforesaid obligation or bond from the National Surety Company and Richard Realty Company to the Peabody Realty Company.

VI. That the said Richard Realty Company duly entered into possession of the said premises demised to it under the said lease and among other defaults, failed to pay the rent amounting to the sum of Two thousand six hundred sixty-six and 66/100 dollars for the month of April, 1910, pursuant to the terms of said lease, and that the said sum became due and payable on the first day of April, 1910, but under the terms of said lease, the said Richard Realty Company could not be considered in default for the non-payment of said sum of money as rent until thirty days elapsed from the time said sum as rent became due and payable. That said sum of money has never been paid and is now due and payable, and that by reason of said default and non-payment of said sum of money as rent, and on the 7th day of May, 1910, proceedings were duly instituted in the City Court of Buffalo, a Court having competent jurisdiction to entertain such proceedings, for the purpose of removing and dispossessing the said Richard Realty Company from said premises,

Complaint—Exhibit

and that such proceedings were duly and regularly conducted and had to the end that on the 9th day of May, 1910, the City Court of Buffalo duly made an order removing and dispossessing the said Richard Realty Company from said premises, and the said order was duly and regularly enforced and the said Richard Realty Company was removed and dispossessed from said premises, and the said plaintiffs were put into possession thereof.

VII. That said plaintiffs have complied with all of the terms and conditions of the said bond, as required by them to be performed and duly notified the said defendant, National Surety Company, within ten days after the occurrence of the said default and dispossession, in writing, as required by the terms and provisions of said bond, and have duly demanded of the said National Surety Company that it pay the sum of Ten thousand dollars as required by the said bond, which it has failed and refused to do.

That by reason of the facts and circumstances herein set forth, plaintiffs have sustained damages in excess of Ten thousand dollars, and that the said defendants, National Surety Company and said Richard Realty Company have become and are indebted unto these plaintiffs in the sum of Ten thousand dollars, with interest thereon from May 12th, 1910.

Wherefore, plaintiffs demand judgment against said defendants for the sum of Ten thousand dollars, with interest thereon from May 12th, 1910, besides the costs of this action.

SHIRE & JELLINEK,
Attorneys for Plaintiffs,
930-944 Prudential Building,
Buffalo, N. Y.

EXHIBIT "A"

KNOW ALL MEN BY THESE PRESENTS, That the RICHARD REALTY COMPANY, a New York corporation, as

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principal, and the NATIONAL SURETY COMPANY, a New York corporation, having its principal offices at No. 346 Broadway, in the City, County and State of New York (hereinafter called the Company), as Surety, are held and firmly bound unto the PEABODY REALTY COMPANY, a New York corporation, having its principal office in the City of Buffalo, New York (hereinafter called the Obligee), in the sum of TEN THOUSAND (\$10,000) DOLLARS, lawful money of the United States, for the payment of which sum, well and truly to be made, the said Principal binds itself, its successors and assigns and the Company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and delivered this eighth day of May, 1907.

WHEREAS, the said Principal heretofore entered into a certain written lease with the said Obligee, a copy of which lease and the amendments thereto is hereto attached, marked Exhibit "A," and made a part hereof, which lease provided for the securing of the Obligee in the manner therein provided; and

WHEREAS, it has been agreed between the Principal and the Obligee that the manner of such security be so altered as to permit the substitution therefor of a corporate surety bond to be executed by the Company, as Surety, the said Principal and Obligee otherwise confirming all the provisions of said lease;

NOW THEREFORE, THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH, That if the said Principal shall well and truly perform all of the terms and conditions of said lease on its part to be performed, then this obligation shall be void. In case, however, the principal shall fail to perform any of the terms of the lease on its part to be performed, and is dispossessed by the obligee by reason thereof, then in that event the said Company is bound in said sum of Ten Thousand (\$10,000) Dollars, which said sum said Company hereby agrees to pay forthwith to

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said Obligee, upon such dispossession, as stipulated and liquidated damages and not as a penalty.

THIS BOND is executed by the Company upon the following express conditions:

FIRST: No liability shall attach to the Company hereunder for any default on the part of the principal in the performance of the terms and conditions of said lease as hereinbefore provided, unless the Obligee shall promptly upon knowledge thereof, and in no event later than ten days after the occurrence of such default and dispossession, notify the Company in writing, by registered mail, at its principal office in the City of New York of such default and dispossession, accompanied by a statement of facts showing the date of such dispossession and the grounds therefor.

SECOND: That in no event shall the Company be liable hereunder for a greater sum than Ten Thousand (\$10,000) dollars.

IN WITNESS WHEREOF, The said Principal has caused this instrument to be duly executed and sealed by its officers proper for the purpose, and the Company has caused this instrument to be duly executed and sealed by its officers proper for the purpose the day and year first above written.

RICHARD REALTY COMPANY,
by R. L. Rafalsky,
President.

NATIONAL SURETY COMPANY,
by William J. Griffin,
Vice-President.

Attest: MARK RAFALSKY,
Secretary.

Attest: LEONARD DAMMANN,
Asst. Secretary.
[Verification.]

Enforcing Contracts for Liquidated Damages

ENFORCING CONTRACTS FOR LIQUIDATED DAMAGES

A distinct change in the attitude of the courts respecting the enforcement of contracts providing for liquidated damages, is noted by the Federal Supreme Court in the case of *United States v. Bethlehem Steel Co.*, 205 U. S. 105.

Doubtless it would be difficult to support some of the older decisions on purely logical grounds. They proceeded upon the theory that even though a contract specifically and clearly provided on its face that a sum mentioned should be considered as liquidated damages, in case of a breach thereof, nevertheless the court would inquire into the circumstances in each case, in addition to considering the words of the contract, to gather the intention of the parties. The other rule that where a written contract is clear and explicit as to its terms the court will enforce it and determine that the intent of the parties must be conclusively presumed to be that which was expressed in the contract, was apparently ignored. This exception, as to contracts providing for the payment of liquidated damages, clearly was an attempt on the part of the courts to do more exact justice by modifying the rigors of harsh contracts, where the real damages were in small proportion to the sum specified in the agreement as liquidated damages. Doctrines were established, which indicated the intent. One of these was that where the actual damages were so small, in comparison with the amount specified as liquidated damages, that an enforcement of the contract would cause a shock to the moral sense, that the parties would be presumed to have intended the amount specified as a penalty instead of liquidated damages. *Cothel v. Talmage*, 9 N. Y. 551; *Dunn v. Morgenthau*, 73 App. Div. 147; 76 Supp. 827; aff'd on opinion below 175 N. Y. 518. This was a corollary to the other doctrine that the court would examine into the circumstances in each case to determine the intent of the parties, in spite of the precise words of the contract. *Little v. Banks*, 85 N. Y. 258; *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45; *Cohwell v. Lawrence*, 38 N. Y. 71.

Both of these rules are still enforced. But there is a tendency not to draw the line quite so sharply where the actual damages are uncertain, the contract is unambiguous and no fraud or sharp practice is proved. A close examination of many of the older

Enforcing Contracts for Liquidated Damages

cases will demonstrate that usually such contracts have been enforced only when it appeared that the actual damages were approximately the same as the amount specified as liquidated damages. *Kemble v. Farren*, 6 Bing. 141; *Jackson v. Baker*, 2 Edw. Ch. 471; *Spencer v. Tilden*, 5 Cow. 144; *Niver v. Rossman*, 18 Barb. 50; *Mott v. Mott*, 11 Barb. 127; *Beale v. Hayes*, 5 Sandf. 640. The above-mentioned cases were cited by the Court of Appeals in *Curtis v. Van Bergh*, 161 N. Y. 47, at page 52, and the Court remarked:

"These authorities show that the courts have struggled hard against the apparent intention of the parties, in order to relieve the one in default from an improvident bargain. It is, however, the law of this State, as settled by this court, that where the language used is clear and explicit to that effect, the amount is to be deemed liquidated damages when the actual damages contemplated at the time the agreement was made 'are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss.'"

From the above declaration it appears that even in cases where the damages are not susceptible of proof as to the exact amount, the courts will, nevertheless, consider the broad equities and will refuse to enforce harsh agreements, however clear the terms thereof may be, for it is said that if the damages are uncertain and the amount stipulated not out of proportion to the actual injury the contract will be enforced. Perhaps no better exemplification of the working out of this principle can be found than the case of *Curtis v. Van Bergh*, *supra*, from which the foregoing quotation is taken. There a contract was under consideration, which contract contained the following provision:

"In case the said party of the first part" (the owner who had agreed to put up the building) "shall be unable for any reason to erect said building according to the plans and specifications hereinbefore referred to and to have the same completed on or before the first day of July, 1896, then and in that case said party of the first part shall pay to the said parties of the second part," (tenants who had leased the building to be erected), "the sum of \$50 for each day after July 1, 1896, that the same shall not be completed as fixed, settled and liquidated damages of the

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parties of the second part, which they will sustain by reason of the failure of said party of the first part to complete said building at the time hereinbefore specified."

The court upheld the contract in that case, but only after considerable discussion showing not only that the damages were extremely uncertain, but also that the liquidated damages specified were in reasonable proportion to the injury which might actually be caused to the defendant by reason of the breach of the contract. So while the court sustained the contract it felt compelled to justify this action by showing that the actual and liquidated damages were approximately the same, or at least that the actual damages might be fully as great as the liquidated damages specified.

The change in sentiment seems to be concerned principally, if not entirely, with this latter species of agreements. If the damages flowing from the breach of a contract are in their nature uncertain and impossible, or perhaps, even difficult, of computation, the courts will permit the parties themselves to decide in advance the amount payable in case of a breach. *Ward v. Hudson River Building Co.*, 125 N. Y. 230. This is put on the specific grounds that the parties themselves are usually better able to determine this question than is the court or jury, particularly when they fix the amount while they are free to say whether or not they will enter into the contract at all, and no fraud or duress has been practiced. *Curtis v. Van Bergh*, 161 N. Y. 47, 53; *Jaquith v. Hudson*, 5 Michigan, 123; *Jones v. Binford*, 74 Maine, 439. But even these cases seem to hold that although there is uncertainty as to the actual damages the sum liquidated must bear some reasonable proportion of the actual injury which might be suffered.

The foregoing general statement of the law is examined a little more closely in the recent cases which are cited in the following pages.

"The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the parties aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions and they now have become strongly inclined to

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let parties make their own contracts and to carry out their intention even when it would result in the recovery of an amount stated as liquidated damages upon proof of a violation of a contract and without proof of the damages actually sustained. The question also is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out." *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 119.

It has recently been said that, "Whenever the damages flowing from the breach of a contract can be easily established, or the damages fixed are, plainly, disproportionate to the injury, the stipulated sum will be treated as a penalty. Where, however, the damages resulting from the breach would be uncertain, or difficult, if not incapable of ascertainment, then the agreement of the parties liquidating them, in anticipation, will be enforced." *Posner v. Rosenberg*, 2 Bradbury's Pl. & Pr. Rep. 5, 9, quoting with approval, the same language from *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N. Y. 479.

In *Posner v. Rosenberg* (*supra*) the parties entered into a contract whereby the plaintiff was to be employed by the defendants and was to receive a salary and a certain percentage of the profits of the business. The contract contained a clause that in case of its breach the damages should be liquidated at the sum of \$10,000. It was held that this was a proper case for the enforcement of such a condition.

In *Jaquith v. Hudson*, 5 Michigan, 123, the court remarked: "There are great numbers of cases where from the nature of the contract and the subject-matter of the stipulation for the breach of which the sum is provided it is apparent to the court that the actual damages for a breach are uncertain, in their nature difficult to be ascertained or impossible to be estimated with certainty by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances and, therefore, better able to compute the actual or probable damages than courts or juries from any evidence which can be brought before them. In all such cases the law permits parties to ascertain for themselves and to provide in the contract itself the amount of the damages which shall be paid for the breach."

In determining whether a contract provides for liquidated

Enforcing Contracts for Liquidated Damages

damages or for a penalty, the court must look to the subject-matter of the contract and the intention of the parties. *Nichols & Shepard Co. v. Beyer*, 168 Mo. App. 686; 153 S. W. Rep. 794.

In the last-mentioned case the parties entered into a contract to purchase a threshing machine which contract contained a provision that should the defendant fail to complete the purchase he should pay certain shipping charges and that the purchaser (defendant) would "pay fifteen (15) per cent. of the above contract price which is hereby agreed shall be and constitute the liquidated damages for such breach of this contract." The court refused to enforce the contract saying the term "liquidated damages" used in the contract was not conclusive when it appeared to have been inserted as "scare money" and not to compensate but to deter a breach.

The intention of the parties control in determining whether damages stipulated for are liquidated damages or a penalty, and if it satisfactorily appears that the damages as to which a stipulation is made were inserted because the parties at the time anticipated the possible injury resulting from the breach and fixed upon a reasonable sum to cover such damages, the contract will be enforced. *Strode v. Smith*, 000 Ore. 000; 131 Pac. Rep. 1032.

The intention of the parties to a contract and the language used by them is of weight but not controlling in determining whether a stipulation as to the amount of damages recoverable for a breach is a penalty or is intended as liquidated damages. *Mount Airy Milling & Grain Co. v. Runkles*, 118 Md. 371; 84 Atl. Rep. 533. In the last-mentioned case the seller of a grain elevator business agreed, after an option to purchase had been exercised, not to re-engage in the business for five years "under a penalty of \$6,200 as liquidated damages," and it was held that the contract must be construed as providing for a penalty and not liquidated damages.

"It is fully settled that, where a large sum is to be paid in default of paying a smaller sum agreed to be paid by the same instrument, then the larger sum is a penalty, although the instrument denominates it liquidated damages." *Lampman v. Cochran*, 16 N. Y. 275. Quoted with approval in *Feinsot v. Burstein*, 78 Misc. 259; 138 Supp. 185. But see the last-mentioned case again reported, 000 Misc. 000; 141 Supp. 330.

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Where the amount agreed to be paid for the breach of the contract greatly exceeds the actual damages suffered on account of the delay the court will be disposed to treat the stipulated sum as a penalty and not as liquidated damages. *Elgin J. & E. Ry. Co. v. Northwestern National Bk.*, 165 Ill. App. 35.

A provision in a contract fixing \$3,000 as the liquidated damages for a breach, when the actual damages for such a breach could not have exceeded \$1,800, was held to be a stipulation for a penalty and not for liquidated damages. *Stoner v. Shultz*, 69 Wash. 687; 125 Pac. Rep. 1026.

In an action upon a contract to pay a specified sum for certain chattels, if they are not returned, it is proper to permit the defendant to show their actual value as bearing upon the question as to whether the amount specified is to be regarded as a penalty or in the nature of liquidated damages. *Hicks v. Monarch Cycle Mfg. Co.*, 176 N. Y. 111.

When the defendant in selling a barber shop agreed not to open or work in another shop within five blocks of the shop sold "under penalty of a fine of \$300," it was held that this was an agreement for liquidated damages although the word "penalty" was used. *Liotta v. Abruzzo*, 82 App. Div. 429; 81 Supp. 877.

An agreement for the exchange of a stock of merchandise for real property contained a provision for liquidated damages in the sum of \$1,000 if either party failed to perform the contract of exchange, and a further provision for liquidated damages in the same sum if the owner of the merchandise should engage in a certain business after making the exchange, and it was held that the contract should be enforced as one for liquidated damages. *Orenbaum Bros. v. Sowell Bros.*, 00 Tex. Civ. App. 000; 153 S. W. Rep. 905.

Where a publisher of law reports, under a contract with the State, was required to sell such reports at a specified price, on condition that the publisher should be liable to a penalty of \$100 as liquidated damages for refusal to deliver the books on demand to any person who duly tendered the price stipulated in the contract, it was held that this agreement could be enforced according to its terms by a person to whom the publisher refused to deliver such books upon a proper tender of the price being made. *Little v. Banks*, 85 N. Y. 258.

Under an agreement to buy a stock of goods, it was held that

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a provision that the sum of \$300 should be forfeited as liquidated damages in case of a breach, should be enforced, as the actual damages were difficult of computation. *Dyer v. Cowden*, 000 Mo. App. 000; 154 S. W. Rep. 156.

A contract for the sale of machinery in which it is stipulated that if the buyer refuses to perform, he shall pay 25% of the purchase price and 10% additional as attorney's fees provides for a penalty and not for liquidated damages. *Dilley v. Thomas*, 000 Ark. 000; 153 S. W. Rep. 110.

In a suit to recover on a contract for the manufacture of patented lamp shades, a deposit to secure performance by the defendants as licensees was held to be liquidated damages which limited the extent of the plaintiff's recovery. *Kaplan v. Gray*, 000 Mass. 000; 102 N. E. Rep. 421.

In *Nakagawa v. Okamoto*, 000 Cal. 000; 130 Pac. Rep. 707, a provision was contained in a contract between truck farmers by which each executed a promissory note which was to become due if any of the parties dealt with a certain truck market, and this was held to be in the nature of a penalty and not liquidated damages.

Where a contract for the sale of real estate provided that on the vendee's breach the vendor might retain payments made as liquidated damages, it was held that whether or not such a provision was for liquidated damages or a penalty depended on the circumstances of the case and not on a mere statement to that effect in the contract. *Ould v. Spartanburg Realty Co.*, 00 S. C. 000; 77 S. E. Rep. 866.

Where the vendor having a defective title notified the purchaser of his readiness to convey and brought suit to compel him to take title and was defeated, it was held that the purchaser was not limited to the stipulated damages in the executory contract and was entitled to compensatory damages. *Van Schaick v. Lese*, 31 Misc. 610; 66 Supp. 64.

An agreement by a seller of mortgaged lands to fill the lands up to grade by a certain date, and to pay a stipulated sum as liquidated damages for delay, will be enforced as an agreement for liquidated damages and not a penalty. *Tilton v. McLaughlan*, 83 N. J. Law, 107; 84 Atl. Rep. 1044.

Actual damages for delay in performing a building contract cannot be proved by the owner where the contract provides for

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liquidated damages. *Smith v. Vail*, 53 App. Div. 628; 65 Supp. 834; aff'g 166 N. Y. 611.

A stipulation in a building contract to the effect that if a building was not completed by a particular date the builder should pay \$5 per day from a specified date was held to be a provision for liquidated damages and enforceable as such. *Graham v. Cooper*, 119 Md. 358; 86 Atl. Rep. 991.

A building contract providing that a certain sum as liquidated damages shall be paid by the contractor for each day's delay in completing the building may be enforced by the owner. *Ward v. Hudson River Building Co.*, 125 N. Y. 230.

In *Mosler Safe Company v. Maiden Lane Safe Deposit Company*, 199 N. Y. 479, the question arose on a counterclaim in an action on a contract for building a vault, which provided for a stipulated sum as liquidated damages for each day of delay in the performance of the contract. There were three separate contracts relating to different portions of the work. The defendant claimed the liquidated damages under all of them. The plaintiff admitted the claim under one of the contracts and denied liability under the others. It was found that a portion of the delay was due to the acts of the defendant. It was held that this entirely destroyed the right to claim liquidated damages. The court decided that the defendant could not recover such damages for the portion of the delay caused by the plaintiff when a part of the entire delay was caused by the defendant. In summing up its conclusion on this point the court remarked:

"Where the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is passed, the obligation for liquidated damages is annulled, and in the absence of some provision under which another date can be substituted, it cannot be revived. If the respondent failed to complete within a reasonable time after crediting the appellant's delay, then the latter had a cause of action for the former's neglect and the measure of damages would be the actual loss proved to have been sustained."

A railroad tunnel construction contract provided for liquidated damages for delay and authorized the railroad company, on default, to make a new contract for completion on the contractor's account, and it was held that the right to liquidated damages for delay could not be enforced where the company

Enforcing Contracts for Liquidated Damages

elected to employ a new contractor. *Shields v. John Shields Const. Co.*, 000 N. J. Ch. 000; 86 Atl. Rep. 958.

Where a railroad construction contract provided for a penalty for delay, it was held that a change in the line requiring additional work which entitled the contractors to additional time did not relieve them from liability for unnecessary delay. *Coal and Iron Ry. Co. v. Reherd*, 204 Fed. Rep. 859.

In *Small v. Burke*, 92 App. Div. 338; 86 Supp. 1066, a building contract provided that the contractor would complete the building "on or before the expiration of seventy-two working days . . . under a penalty of twenty-five dollars per day for every day thereafter." The lower court had sustained the contract and penalized the contractor for delay, amounting to seventy-two working days, at \$25 a day. The Appellate Division held that even though this contract should be enforced that much of the delay had been caused by the owner and was not chargeable to the contractor at all and therefore reversed the judgment and ordered a new trial. The court remarked: "This was, undoubtedly, a proper case for the parties, by an appropriate liquidated damage clause, to stipulate the damages that should be paid upon a failure to complete the work within the time specified. Presumptively, however, where the parties unqualifiedly specify a forfeiture as a penalty it was their intention that the amount specified should be a penalty or security for the actual damages and not liquidated damages."

In landlord and tenant cases the rule seems to be that where the loss of rents from the failure of the tenant to perform the covenants of the lease are easily ascertainable, a stipulation for liquidated damages will be construed as a penalty and the landlord will be limited to his actual damages. There are a number of exceptions to that rule of which the case in the text is an example.

The Court of Appeals has laid down the general rule that where a landlord evicts a tenant by summary proceedings he cannot retain a deposit as liquidated damages, although by the strict terms of the lease he has a right to retain such a deposit upon a breach of the covenants of the lease. *Chaude v. Shepard*, 122 N. Y. 397; *Caesar v. Robinson*, 174 N. Y. 492; *Scott v. Montells*, 109 N. Y. 1. In all of these cases it appeared that the relation of landlord and tenant had ceased and that there was no

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further liability on the part of the tenant. Under the doctrine which sustains the right of the landlord to hold the tenant on the covenants to pay rent in the lease in spite of having dispossessed him a different rule may eventually be established as to the right of the landlord to retain a deposit as liquidated damages. For example if the lease provides that in case dispossession proceedings are taken by the landlord and the tenant ousted, that the landlord may still rent the premises as agent of the tenant and that the tenant will pay any deficiency between the amount collected by the landlord for the balance of the term and the amount of rent reserved in the lease, the sum which the landlord would be entitled to recover eventually would be uncertain at the time of the eviction under the dispossession proceedings. There appears to be no reason why an agreement for liquidated damages in such a case would not be enforced. Naturally the liquidated damages would necessarily be in lieu of the right to recover the balance of the rent. It might be that the landlord could acquire the right to elect which remedy he would pursue, by proper recitals in the lease, but obviously he could not pursue both remedies, except in a very extraordinary case, which cannot now be imagined.

In *Feinsot v. Burstein*, 000 Misc. 000; 141 Supp. 330, the lease under consideration contained the following clause:

"The said parties of the second part have deposited with the party of the first part the sum of two thousand (\$2,000) dollars in good lawful money of the United States of America, the receipt whereof is hereby acknowledged, as security for the faithful performance of *all* the covenants and conditions of this lease on the part of the parties of the second part, and in case of any breach thereof by said parties of the second part the said amount of money shall be held and retained by the said party of the first part as liquidated damages for said breach. And the parties further agree that in the event that the said parties of the second part shall be dispossessed, on summary proceedings brought to recover possession of said premises and to remove them therefrom, that the said party of the first part shall nevertheless have the right to retain the said sum of two thousand (\$2,000) dollars as liquidated damages and not as a penalty."

The premises consisted of a seven-story, brick tenement house with accommodations for fifty-eight tenants. The tenant under the lease had agreed to make repairs, to pay certain water rents

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and comply with orders of the municipality and its departments at the expense of the tenant. It was held that under such circumstances the loss of the landlord *might* be more than the liquidated damages specified in the lease and the provision quoted should be enforced. This decision was made by Mr. Chief Justice O'DWYER, of the City Court of New York, after the Appellate Term of the First Department had held, on demurrer, that the provision of the lease as to liquidated damages could not be sustained. See 78 Misc. 259; 138 Supp. 185.

A deposit by a tenant of a sum equal to two months' rent under a lease for three years of premises occupied by sixty families, rent to be paid semi-monthly, was held to be deemed liquidated damages on the lessee surrendering or being dispossessed before the expiration of the term. *Feyer v. Reiss*, 154 App. Div. 272; 138 Supp. 964.

In *Guerin v. Stacy*, 175 Mass. 595; 56 N. E. Rep. 892, it was held that a sum agreed to be paid by a lessee to his sub-lessee as liquidated damages, in the event of the latter being ousted through the acts of the former before the expiration of the lease must be construed as liquidated damages and not as a penalty, inasmuch as the injury for the breach of an agreement for the protection of a tenant against being ousted before the expiration of his lease was one that could not be measured in damages.

The provision of a contract for the payment of \$200, in the event of a violation of an agreement that a store should not be erected for general merchandise was held to be enforceable as an agreement for liquidated damages and not a penalty. *Berghuis v. Schultz*, 119 Minn. 87; 137 N. W. Rep. 201.

Under a contract requiring the lessee of certain premises for the term of three years to make repairs to the value of \$4,000 and providing that in case of his failure so to do, the landlord could recover this amount, it was held that this was a provision for liquidated damages which would be enforced. *Vaulx v. Buntin*, 000 Tenn. 000; 153 S. W. Rep. 481. In the last-mentioned case it was said that liquidated damages will not be treated as a penalty when there is a practical equality between the stipulated sum and the actual damages.

Where it was stipulated in a long term lease for the erection on real estate of a building to cost \$100,000, that the lessee

Enforcing Contracts for Liquidated Damages

should provide a bond in the sum of \$50,000, conditioned for the performance of the lease as to the erection of said building and it was stipulated that the sum of \$4,000 should be paid as liquidated damages for a failure of the lessee to furnish the bond, it was held that this contract should be enforced. *Strode v. Smith*, 000 Ore. 000; 131 Pac. Rep. 1032.

Where a tenant gave a bond under an agreement to erect a particular sort of building on a leased lot within a specified time, obey building laws and prevent the attachment of liens, it was held that the bond was a penalty and the owner could not recover the amount thereof as liquidated damages, where a tenant failed to erect any building. *O'Brien v. Illinois Surety Co.*, 203 Fed. Rep. 436.

A bond in the penal sum of \$1,000 given by purchasers of a street railway franchise conditioned for the compliance with an ordinance granting the franchise, was held to provide for liquidated damages upon a failure to comply with the ordinance. *Scott's Administrators v. City of Mayfield*, 000 Ky. 000; 155 S. W. Rep. 376.

Under a contract of employment a driver of a milk wagon deposited a certain sum to be held as liquidated damages if he failed to account for collections and it was held that the driver was not entitled to recover the deposit where he was discharged for deficiency in his cash reports of collections. *Whitson v. Sheffield Farms-Slawson-Decker Co.*, 76 Misc. 180; 136 Supp. 560.

A provision in a contract of employment for one year that the employe should forfeit \$250 for breach of the same was held to be a provision for liquidated damages and not for penalty. *Myers-Goldberg Neckwear Co. v. Grossman*, 167 Mo. App. 722; 151 S. W. Rep. 163.

Where a contract of employment by a mercantile establishment of a person for a general manager, for the term of five years, at \$1,800 a year, contained a provision for liquidated damages in the sum of \$1,750 if the employe should be discharged within twenty-five months, it was held that this was a reasonable adjustment in the nature of liquidated damages. *Jacobs v. Shannon Furniture Co.*, 32 Ohio Cir. Cr. Rep. 51.

A contract between a corporation organized to promote the interests of tobacco growers, and a tobacco grower, stipulating that on failure to comply with the contract the grower would pay

the corporation as liquidated damages a specified sum, was held to be enforceable as a contract for liquidated damages. *Burley Tobacco Society v. Gillaspie*, 000 Ind. App. 000; 100 N. E. Rep. 89.

Parties to a charter party may stipulate the agreed value of the vessel, as liquidated damages to be paid in the event of a failure to return the vessel and such stipulation is conclusive upon them in the absence of fraud or mistake. *Sun Printing and Publishing Assn. v. Moore*, 183 U. S. 642.

JOSEPH BECK & SONS, Plaintiff, v. SIGMUND TYNBERG,
Defendant

(Supreme Court, N. Y. Special Term, Part I, March 25, 1912)

Bill of particulars; order precluding giving of evidence; practice where it is contended that the bill served is insufficient

1. Where it is contended that a bill of particulars, served in compliance with an order therefor, is not sufficiently explicit, it should be returned and a motion made, at Special Term, on notice, for a more specific bill before a motion is made to preclude the party furnishing the bill from giving evidence at the trial because of failure to comply with the order for a bill of particulars.

Motion to preclude the giving of evidence at the trial for failure to comply with an order for a bill of particulars.
Denied.

Max D. Steuer for the plaintiff.

Samuel P. Goldman for the defendant.

PLATZEK, J.:

Denied, without prejudice to renew, and without costs. This application to preclude the giving of evidence for failure to furnish all the required particulars is premature. The proper practice is if the bill does not comply with the order directing it to be served or sufficiently explicit, it should be returned and motion made at Special Term on notice for a more specific bill. *Faller v. Ranger*,

Opinion of the Court

99 App. Div. 374; 91 Supp. 205; *Reader v. Haggan*, 114 App. Div. 112; 99 Supp. 681; *Smith v. Bradstreet Co.*, 134 App. Div. 567; 119 Supp. 487; *Hein v. Honduras Syndicate*, 138 App. Div. 786; 123 Supp. 431.

RALPH WALDT, Plaintiff, v. GOODWIN MANUFACTURING
COMPANY, Defendant

(Supreme Court, N. Y. Special Term, Part I, March 14, 1912)

Pleading; answer; demurrer; motion for judgment on the pleadings; master and servant; action for unlawful discharge; defense that the plaintiff's services were unsatisfactory

1. In an action for the unlawful discharge of the plaintiff as a salesman, it was alleged in the answer that the plaintiff was employed for a period of three years under a contract that the employment should continue "only so long as the plaintiff's services were satisfactory, and further provided that the defendant should have the privilege of terminating the said contract, should the services of the plaintiff prove unsatisfactory," and it was further alleged "that the plaintiff's services proved unsatisfactory to the defendant and that the defendant . . . wrote the plaintiff a letter notifying him that his services would not be required." It was *held* that these allegations were sufficient as pleading a defense which the plaintiff might be permitted to prove upon the trial.

Demurrer to answer.

Overruled.

Max Monfried for the plaintiff.

O'Gorman, Battle & Marshall for the defendant.

HENDRICK, J.:

Motion for judgment on demurrer to a defense. The complaint alleges a wrongful discharge of plaintiff as a salesman. The answer alleges that plaintiff was employed for a period of three years, "but that the said contract provided that the employment should continue only so

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long as the plaintiff's services were satisfactory, and further provided that the defendant should have the privilege of terminating the said contract, should the services of the plaintiff prove unsatisfactory." "That the plaintiff's services proved unsatisfactory to the defendant, and that the defendant . . . wrote the plaintiff a letter notifying him that his services would not be required." Some of the cases decide that under such a contract an employee cannot be arbitrarily discharged, but that the services must be unsatisfactory to the employer as a matter of fact, and the discharge must be made for that reason. Other cases hold that after services have been rendered the employer cannot avoid payment on the ground that they were unsatisfactory, no facts being given on which dissatisfaction is based. But neither of said classes of decision is applicable here. The answer alleges that the services were not satisfactory and the discharge followed. Whether those facts can be proved or whether proof is necessary are questions not presented by the demurrer. The allegations are sufficient and they constitute a defense. *Crawford v. Mail & Express*, 163 N. Y. 404; *Brown v. Retsof Co.*, 127 App. Div. 368; 111 Supp. 594; *Ginsberg v. Fredman*, 146 App. Div. 779; 131 Supp. 517. The demurrer to the separate defense must be overruled.

LEONA STONE, Plaintiff, v. CELIA SCHWARTZREICH,
Defendant

(Supreme Court, N. Y. Special Term, Part 3, March 19, 1912)

Pleading; complaint; demurrer; negligence; nuisance; plaintiff alleged to have been "lawfully" on premises of defendant; conclusions; non-compliance with Tenement House Law; failure to allege facts

1. The word "lawfully," used in a pleading without an averment of the special facts of which it is predicated, affirms

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merely a matter of law, is not traversable, and is ineffective as a pleading. When it is averred, therefore, that a person is "lawfully" on the premises of the defendant, in an action for damages by reason of nuisance or negligence, such an averment is insufficient without an allegation of special facts showing the character in which the person entered said premises, and indicating that the defendant owed some duty to such person.

2. There is no general obligation on the owner of a tenement house to keep the premises lighted. By reason of the Tenement House Law, under certain conditions, and at certain times therein named, he is required to have an artificial light burning, and in an action in which it is claimed that an injury was caused by reason of the absence of such a light there must be averments of facts showing a non-compliance with the Tenement House Law.
3. Section 95 of the Building Code, requiring guards or gates protecting hoistways, freight elevators or wellholes not inclosed in walls, does not refer to stairways in tenement houses.

Demurrer to complaint.

Sustained.

Goldstein & Goldstein for the plaintiff.

Arthur Nayer for the defendant.

PAGE, J.:

The complaint seems to be framed either on the theory of nuisance or of negligence, and as most of the allegations consist of statements of conclusions of law instead of facts it is difficult to determine on what theory the defendant could be held liable. As it is not claimed that the injuries were occasioned by active negligence, but either by passive negligence or the maintenance of a nuisance in the premises, it is important that the complaint should disclose some duty that the defendant owed to the plaintiff the violation of which caused the injury. The complaint alleges "upon information and belief that on the 20th day

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of April, 1911, while plaintiff's said wife was *lawfully* upon the said premises." It is important to plaintiff's cause of action that the manner and reason for the presence of plaintiff's wife should be shown. If we treat the word "lawfully" as mere legal conclusion it is ineffective in the pleading. As Judge McADAM, in delivering the opinion of the court, said: "Thus the words 'duly,' 'lawfully,' &c., without a statement of the special facts of which they are predicated, have in general no effect; for such terms are not only indefinite, but affirm matters of law and not of fact, and hence are not traversable." *Hanson v. Langan*, 9 Supp. 625. If, however, we attempt to give it effect, it can mean no more than that she was on the premises as a licensee. To her, in that character, the defendant owed no duty in the construction of his premises, nor to guard excavations that he had made for his own use, nor to place lights in dark places. *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391; *Racine v. Morris*, 136 App. Div. 467, 470; 121 Supp. 146. Unless there is some statutory obligation imposed on the defendant for the benefit of the plaintiff's wife there would exist no cause of action. The plaintiff states that "the defendant at all times hereinafter mentioned has failed to keep the premises properly lighted as required by law." This is a mere legal conclusion and states no facts whatsoever. There is no general obligation on an owner of a tenement house to keep his premises lighted. By reason of the Tenement House Law, under certain conditions and at certain times therein named, he is required to have an artificial light burning, but there is nothing to show that these conditions obtained in this case. He next alleges that the defendant "maintained an opening in the floor of the hall on the ground floor of said premises, with a staircase leading from said opening to the cellar; that said staircase and opening were constructed and maintained in violation of law and were a nuisance" (these are allegations of legal conclusions), "and that defendant unlawfully, negligently and care-

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lessly left and permitted the said opening to remain unguarded and without any barrier or protection at the times stated." Plaintiff's attorney argues that a violation of § 95 of the Building Code was here intended to be alleged. That section applies to any building in which shall be any hoistway or freight elevator or wellhole not inclosed in walls, and requires that guards or gates protecting the shaft should be kept closed at all times except when in actual use. Probably no one except plaintiff's attorney ever claimed that this law required all stairways to be furnished with guards or gates that had to be kept closed except when some person was passing through them. The complaint fails to state facts sufficient to constitute a cause of action, and the demurrer will be sustained, with costs, with leave, however, to the plaintiff to serve an amended complaint on payment of costs within twenty days.

CAPE MAY GLASS COMPANY, Plaintiff, v. JETTER BREWING COMPANY, Defendant

(City Court of the City of New York, March 14, 1912)

Pleading; answer; denial of knowledge or information sufficient to form a belief; action for goods, sold and delivered against a corporation; foreign corporation; defense of failure to procure certificate permitting the doing of business in the State of New York; sufficiency

1. In an action against a corporation for goods sold and delivered, a denial of knowledge or information sufficient to form a belief as to the allegations of the complaint is frivolous.
2. A defense based on the failure of the plaintiff to procure a certificate permitting it to do business in this State must be based on allegations showing that the contract was made in this State and that the plaintiff was doing business in this State.

Bassett, Thompson & Gilpatric for the plaintiff.

Katz & Sommerich for the defendant.

FINELITE, J.:

This is a motion made under the provisions of §§ 537 and 538 of the Code of Civil Procedure to strike out as sham the further and distinct defense of the amended answer as set forth in paragraphs second, third, fourth, and fifth, and overruling the denials set forth in paragraph first of said amended answer as frivolous, and for judgment thereon. The complaint herein sets forth two causes of action, the first for goods sold and delivered between certain dates at the agreed price of \$327.65, the second for damages amounting to \$255.64 arising out of a breach of contract dated October 26, 1910, wherein defendant agreed to order and take 500 gross of bottles before August 31, 1911, but refused to take seventy-seven gross thereof. Both of these causes of action are based upon the said contract dated October 26, 1910. The amended answer in paragraph first thereof denies the allegations of the complaint by alleging in words as follows: Denies any knowledge or information sufficient to form a belief of the allegations of the complaint numbered first, third, fourth, fifth, sixth and seventh. The allegations contained in the remaining paragraphs of the answer, to wit, second, third, fourth and fifth, seek to set up the further and separate defense that the plaintiff has failed to comply with the provisions of § 15, article 2, chapter 23, of the Consolidated Laws, which require a foreign corporation doing business within this State to obtain a proper certificate from the Secretary of State before it can maintain an action upon a contract made in this State. The amended answer is verified by J. E. Jetter, secretary of the defendant corporation, and by the first paragraph it denies any knowledge or information as to the making of the contract between the plaintiff and the defendant on

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October 26, 1910. By paragraph four thereof the said Jetter alleges upon knowledge that the said contract was made and entered into in the State of New York. Whether the pleading interposed by the defendant is or is not frivolous must be determined by an inspection thereof. Affidavits cannot be used to support the objection to the pleading. *Dancell v. Goodyear S. M. Co.*, 67 App. Div. 498; 73 Supp. 875; *Northern Bank of N. Y. v. Becker*, 65 Misc. 579; 120 Supp. 880. A pleading will not be regarded as frivolous unless its insufficiency is apparent upon a mere statement, without argument. *Rankin v. Bush*, 93 App. Div. 181, 185; 87 Supp. 539; *Ship v. Fridenberg*, 132 App. Div. 782; 117 Supp. 599. Nor if denials in an answer as to the material allegations of the complaint cannot be stricken out, although shown by affidavit to be false, or although the answer contains new matter pleaded as a separate defense which is inconsistent with the denials to be stricken out as sham, whether such denials are absolute or upon information and belief, or upon an allegation that the defendant has no knowledge or information sufficient to form a belief as to the truth of such allegations of the complaint. *Schlesinger v. McDonald*, 106 App. Div. 570; 94 Supp. 721; *Schlesinger v. Wise*, 106 App. Div. 587; 94 Supp. 718. Nor can an answer be stricken out as sham where it alleges an affirmative defense. A denial can never be treated as sham, namely, as false; the only defense to be treated as sham is when both denials and defenses may be frivolous. A denial is frivolous when upon its face it is not a denial, and a defense is frivolous when upon its face it is not a defense. The remedy for a frivolous denial or defense is a motion for judgment thereon, and the remedy for a sham defense is a motion to strike it out. A denial of any knowledge or information sufficient to form a belief of allegations of the complaint is permitted only out of necessity to meet rare cases where the defendant is honestly without any knowledge or information thereof sufficient to form a belief as to their

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truth or falsity. This form of denial has to be permissible in the particular case and followed in all substantial particulars in order not to be frivolous. The denials set forth in paragraph four of the amended answer, whether or not he made his contract for the purchase of said bottles, and which contract was signed by said secretary and treasurer of the defendant, such knowledge is presumed to be within the defendant's possession as to whether or not he ordered and took merchandise from the plaintiff, or whether he received said merchandise as called for under said contract. *Rochkind v. Perlman*, 123 App. Div. 808; 108 Supp. 224, 1151; *Olsen v. Singer Mfg. Co.*, 143 App. Div. 142; 127 Supp. 697, wherein BURR, J., has correctly stated the rule to be "that when the facts alleged are presumptively within the knowledge of the pleader, or when they are matters of record, easy of access, so that the truthfulness of the allegation is a subject of convenient and ready determination, he is not permitted to make a bald and unexplained denial of any knowledge and information respecting the same." *Dahlstrom v. Gemunder*, 198 N. Y. 449; *Preston v. Cuneo*, 140 App. Div. 144; 124 Supp. 1031; *Rochkind v. Perlman*, *supra*. Defendant is presumed to have knowledge or information whether or not he did receive seventy-seven gross of bottles or whether the plaintiff demanded from him payment of the same. As was said by SCOTT, J., in *Allen v. Nat. Surety Co.*, 144 App. Div. 509, 510; 129 Supp. 228: "If the defendant has no knowledge or information upon the subject it can only be because he has willfully abstained from making the very slight investigation which would have at once remedied his lack of knowledge. To interpose such an answer in such a case is a clear evasion." *Rochkind v. Perlman*, *supra*; *City of N. Y. v. Matthews*, 180 N. Y. 41. There is but one other question left to decide, and that is that the denial to the complaint upon information and belief of the first allegation of the plaintiff's complaint, that the plaintiff is a corporation organ-

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ized and existing under the laws of the State of New Jersey, with its office and principal place of business at Cape May Court House, New Jersey. With reference to the making of this contract it is incumbent upon the defendant to allege and prove that the contract was made in this State and that the goods were purchased in this State and that the plaintiff was doing business in this State, and a denial such as interposed herein has been held to be bad; that it is presumed that the contract such as the one sued upon in this action, having been made in a foreign State and executed in a foreign State, it is presumed that it was made in a foreign State. *L. C. Page Co. v. Sherwood*, 65 Misc. 543; 120 Supp. 837; *Tallapoosa Lumber Co. v. Holbert*, 5 App. Div. 559; 39 Supp. 432; *St. Albans Beef Co. v. Aldridge*, 112 App. Div. 803; 99 Supp. 398; *Brown Seed Co. v. Richardson*, 53 Misc. 517; 103 Supp. 243; *Novelty Mfg. Co. v. Connell*, 88 Hun, 254; 34 Supp. 717; *Fresno Home Packing Co. v. Turle & Skidmore*, 60 Misc. 79; 111 Supp. 839; *Murphy Varnish Co. v. Connell*, 10 Misc. 553; 32 Supp. 492. As this motion is made under the provisions of §§ 537 and 538 of the Code of Civil Procedure the motion must therefore be granted for the reasons hereinabove pointed out, and the defenses alleged in the defendant's answer must be stricken out as frivolous. Motion granted, with \$10.00 costs.

KATHERIN NELSON, Plaintiff, v. A. H. WOODS PRODUCTIONS COMPANY, Defendant

(Supreme Court, N. Y. Special Term, Part 3, March 19, 1912)

Demurrer to answer; denials incorporated in affirmative defenses; necessity of moving to strike out denials before demurring to affirmative defenses

1. In the first department it is the rule that where an answer contains denials incorporated in a separate defense in an

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answer, the plaintiff must move to strike out the denials before demurring to the separate defenses.¹

Demurrer to separate defenses in the answer.
Overruled.

Max D. Josephson for the plaintiff.

Nathan Burkan for the defendant.

PAGE, J.:

Plaintiff demurs to the fourth and fifth separate defenses set up in the answer on the ground that they are insufficient on their face. Each of the defenses begins by a general denial on information and belief of all the material allegations of the complaint, and is then followed by the new matter. The denials are not a necessary or integral part of the defenses, which would be complete without them. It is settled in this jurisdiction, however, that the presence of denials in a separate defense precludes a demurrer thereto. *Stieffel v. Tolhurst*, 55 App. Div. 532; 67 Supp. 274; *Haffen v. Tribune Ass'n*, 126 App. Div. 675; 111 Supp. 225. Moreover, a defense may only be demurred to as a whole, and the attempt of the plaintiff to demur to those paragraphs which contain the new matter, to the exclusion of the denials, is unavailing. *Kager v. Brennenman*, 33 App. Div. 452; 54 Supp. 94. Plaintiff's remedy in this situation is to move to strike out the denials as irrelevant or redundant and then demur to the defenses, but so long as the material allegations of the complaint are put in issue by denials contained in the defenses they are not demurrable. The demurrers are therefore overruled, with costs.

¹ The rule appears to be different in the Second Department. *Stern v. Marcuse*, 119 App. Div. 478; 103 Supp. 1026.

For a full discussion of this question see BRADBURY'S RULES OF PLEADING, pages 1277, 1583.

See *Spingarn v. National Surety Co.*, post, page 39.

ISRAEL SPINGARN, Plaintiff, v. NATIONAL SURETY COMPANY, Defendant

(City Court of City of New York, February 13, 1912)

Pleading; answer; denial; repeating denial in affirmative defense ¹

1. Where due performance of the conditions of an insurance policy is pleaded in the complaint, it is necessary in the answer to include specific denials of due performance in affirmative defenses.

Demurrer to affirmative defenses in the answer.
Sustained.

Herman Hahn for the plaintiff.

Joseph L. Prager for the defendant.

DELEHANTY, J.:

The defenses demurred to are insufficient for want of a specific denial of the allegations of due performance of the conditions of the policy pleaded in the complaint. The cases are so in accord upon the proposition that specific denials are absolutely necessary in affirmative defenses of the kind pleaded herein that it would be unprofitable to discuss them at this time. Cases of that class were collected in opinions in this court in *Florsheim v. Berlinger*, *Keith v. Draper* and *Garfein v. Henderson* (N. Y. Law J., Aug. 31, 1911).² Demurrer is therefore sustained,

¹ See *Nelson v. Woods Productions Co.*, *ante*, page 37, and notes.

² The decisions referred to by Mr. Justice DELEHANTY were made by Mr. Justice SCHMUCK at the Special Term of the City Court of the City of New York on August 30, 1911. They are not elsewhere published and are printed in full below:

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with costs, with leave to the defendant to answer over within six days after service of order thereof, with notice

SCHMUCK, J.:

Florsheim v. Berlinger.—The determination of this motion demands consideration of the question whether it is necessary that every answer under all conditions and circumstances contain either a general or specific denial of the allegations of the complaint, irrespective of any affirmative defense therein contained. If answered affirmatively this motion must be granted; if resolved negatively the application will be denied. Pleading in civil actions is regulated by our Code of Civil Procedure. The particular part thereof relating to defenses is found in Chapter 6, article 3. Section 500 of the Code of Civil Procedure provides for the contents of the answer. It requires the answer to contain first a general or specific denial of each material allegation of the complaint controverted by the defendant, either upon positive knowledge or information and belief. Further, it permits a statement of any new matter constituting a defense or counterclaim. The answer thus may consist of a denial or a defense, or both. In consequence a defendant may resist the claim set out in the complaint by pleading new matter as a defense; in other words, by confessing the claim made, but avoiding it by new matter. Under such circumstances the plea must give color to the allegations of the complaint, expressly or impliedly confessing that but for the matter of avoidance set out the action would lie. *Brown v. Archer*, 1 Hill, 266; *McCormick v. Pickering*, 4 N. Y. 276. In consequence such a plea must admit the allegations of the complaint, as is seen in the defense of payment, accord and satisfaction, general release, usury and the other pleas in bar and abatement. All such pleas must be set forth affirmatively. It is too elementary a proposition to require any citation of authority to show that the pleas above enumerated cannot be established under a denial. It would therefore seem to be the test of the manner of pleading that if matter asserted in opposition is negative in character it must be pleaded as a denial; if affirmative it must be alleged as a defense. Of this there can be no doubt. *Stroock Plush Co. v. Talcott*, 129 App. Div. 14; 113 Supp. 214. In this connection it must be remembered that while a defense as such may be inconsistent with the complaint the facts upon which it is founded cannot be inconsistent with the allegations of the complaint. Under such conditions to be a good plea it must be accompanied with either a general or specific denial of the material allegations of the complaint. As is well said in *Smith v. Coe*, 170 N. Y. 162, at 167: "A material fact alleged is not controverted or put in issue by a statement inconsistent with the fact alleged or from which a general denial may be implied or inferred. *Fleischman v. Stern*, 90 N. Y. 110." "Accord-

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of entry thereof, upon payment of said costs. Submitting to the rules of pleading the defendants by omitting to deny, either generally or specifically, the allegations of the complaint have admitted the agreement. . . . Under these circumstances the defendant's various counterclaims, based upon the existence of a contract of warranty and the allegations of the answer in regard to the terms of the contract, though inconsistent with the allegations of the complaint, presented no clear or well defined issue for trial." In short, the answer, lacking a denial and thus admitting the allegations or statement of facts contained in the complaint, cannot predicate a defense upon facts inconsistent with such admissions. In other words, the defendant may not say yes and no to the same thing. He must state one or the other, and in order to negative a statement contained in the complaint the rules of pleading as provided for in the Code of Civil Procedure require the answer to embody either a general or specific denial. From this it can be seen that an answer endeavoring to plead as a defense something based upon an inconsistent statement of fact, that is, inconsistent with that alleged in the complaint, is defective unless said plea is combined with a denial of the allegations of the complaint. It does not, however, follow that all affirmative pleas are abortive unless accompanied by a denial. As has been heretofore pointed out, an affirmative defense of new matter is permissible even though unaccompanied by a denial, for the statement therein contained is not inconsistent with the statement of facts upon which the complaint rests. Indeed, as indicated in *Stroock Plush Co. v. Talcott (supra)*, it is founded upon facts entirely apart from and new to those contained in the complaint. The rule enunciated in *Smith v. Coe (supra)*, therefore does not apply to a defense of new matter, but only to an affirmative plea based upon statements inconsistent with those of the complaint. True it is that in *Banzer v. Richter*, 68 Misc. 192, at 197; 123 Supp. 678, we find this expression: "It has been held in *Smith v. Coe*, 170 N. Y. 162, that an answer to be good must contain denials as well as an affirmative defense or counterclaim (see also *Fleischman v. Stern*, 90 N. Y. 110)." Regardless of the soundness of that decision respecting the matter under consideration the statement just quoted cannot be considered as applying to a defense of new matter. The rule can therefore be succinctly stated as follows: An affirmative plea or counterclaim based upon facts inconsistent with the statement of facts contained in the complaint must be accompanied by a denial of the material asseverations of the complaint, but an affirmative defense of new matter need not be so fortified. Turning to the matter under advisement it is discovered that the plaintiff demands judgment upon the pleadings, contending that the answer of the defendant fails to raise an issue,

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decision and interlocutory judgment accordingly upon two days' notice.

being insufficient because of the lack of denials of the material averments of the complaint. The complaint sets forth a cause of action upon a promissory note pleaded in the short form countenanced by § 534 of the Code of Civil Procedure. The answer contains no denials of any of the material allegations comprising the complaint, but raises the defense of usury. As has hereinbefore been indicated, such defense is one of new matter and need not be connected with a denial of the material assertions of the complaint. Motion for judgment on the pleadings denied, with \$10 costs. Submit order on one day's notice of settlement.

Keith v. Draper.—Upon the pleadings herein the plaintiff demands judgment. The complaint is based upon a promissory note. The answer pleads conditional delivery. No material allegation of the complaint is denied. Because of the absence of any such denial it is contended the answer is bad. Pleading conditional delivery as a defense and not as a denial is improper. Such a plea, particularly in the case under hand, in which it goes to the very essence of the contract, being inconsistent with the statements or allegations of the complaint, can only be controverted by a general or specific denial. *Smith v. Coe*, 170 N. Y. 162; *Fleischman v. Stern*, 90 N. Y. 110. The answer herein, by its absence of any denial admitting the allegations of the complaint, cannot by a supposed or so called defense set up facts inconsistent with such admission of the statements contained in the complaint. Consequently the pleadings herein create no issue, without which there can be no litigation. Motion granted, with \$10 costs, with leave to defendant to amend upon payment of \$30 costs. Said amended pleading to be served and said costs to be paid within six days after notice of entry of the order herein. Submit order upon one day's notice of settlement.

Garfein v. Henderson.—Motion denied. Though awkwardly pleaded, the defenses set up in the answer are good and are effectively pleaded. The resistance to plaintiff's claim being based upon new matter must be pleaded as a defense. *Frank v. Miller*, 116 App. Div. 855; 102 Supp. 277. This the defendant has done, but in a most inartistic manner. This particular phase of the litigation, however, cannot be considered upon an application for judgment of the pleadings. If aggrieved by defendant's failure to comply with § 507 of the Code of Civil Procedure, the motion should be made thereunder and not pursuant to § 547 of the Code of Civil Procedure. The objection that the answer contains no denials is without force or effect. *Florsheim v. Berlinger*, City Court, Special Term, August 30, 1911. Submit order on one day's notice of settlement.

GEORGE M. HARD, Respondent, v. ROSA MINGLE, as Executrix of SAMPSON Q. MINGLE, Deceased, Appellant ¹

(206 N. Y. 179; aff'g 141 App. Div. 170; 126 Supp. 51)

Contribution; guaranty; rights and liabilities of co-guarantors; limitations; action by co-guarantor to recover contribution as to claim which is barred as against principal creditor

1. Mere delay in prosecuting sureties, in the absence of any request to do so, does not discharge a surety who may subsequently find himself prejudiced by such delay.
2. The Statute of Limitations as to a claim by one co-guarantor for contribution against the other co-guarantor, does not begin to run until the first co-guarantor has paid the claim, and the fact that the claim by the principal creditor against one surety is barred by the short Statute of Limitations does not relieve such co-guarantor from liability for contribution, where the claim has been paid by another co-guarantor before it was barred as to him.
3. Where one of three co-guarantors had died, and the principal creditor made a claim against the executor of the decedent's estate, the payment of which claim was refused by such executor, and the principal creditor failed to bring an action within the time specified in the short Statute of Limitations, and one of the other co-guarantors paid the claim before the Statute of Limitations had run as to him, it was held that the co-guarantor who had paid the claim could enforce contribution as against the estate of the deceased co-guarantor.
4. The holder of a joint and several guaranty of payment is not obliged to incur the expense of employing attorneys and prosecuting an action against the estate of the deceased guar-

¹ For complaint from this case, see *post*, page 50.

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antor but has the right to call upon the living guarantors to pay the whole amount, and they may look to the decedent's estate for contribution.

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered January 5, 1911, upon an order reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury, and directing judgment in favor of plaintiff.

W. H. Van Benschoten and Charles H. Edwards for appellant.

Harold Otis for respondent.

HAIGHT, J.:

On the 20th day of July, 1899, the plaintiff, George M. Hard, one Edward Thompson, and the defendant's ¹ testator, Sampson Q. Mingle, executed and delivered to the Chatham National Bank the following instrument: "For value received and for the purpose of giving the Realty Corporation of North America credit at the Chatham National Bank of New York, we hereby jointly and severally guarantee the payment at maturity of all checks, drafts and promissory notes upon which said Realty Corporation of North America is now or hereafter shall be liable, to said bank, as maker, endorser, drawer or acceptor, to an amount not exceeding \$15,000, hereby waiving demand and notice of non-payment thereof, this to be a continuing guaranty."

On the 13th day of July, 1903, the Realty Corporation executed and delivered its promissory note for \$15,000, payable in three months from date, to one Gilbert, who

¹In the official reports this word is erroneously printed "decedent's."

indorsed and delivered the same before maturity for value, to the Chatham National Bank.

On September 15th, 1913, and before said note became due, Mingle died, leaving a last will and testament which has been admitted to probate, whereby he appointed his widow, the defendant, sole executrix, to whom the Chatham National Bank, in due time, presented a claim against the estate of her testator for the principal and interest accrued upon the note, above referred to, which claim was rejected by the executrix, and inasmuch as no action was brought by the bank within the time specified by § 1822 of the Code of Civil Procedure, the claim became barred by that provision of the statute. Thereafter and on or about the 14th day of February, 1906, the defendant caused a written notice to be served upon the plaintiff advising him that the Statute of Limitations had run, as against the claim presented by the bank; that the estate had thereby been relieved from liability upon the note, and that if the plaintiff paid it he did so at his own peril and on his own liability, without right of contribution by the estate. The plaintiff, however, did, on the 20th day of October thereafter, pay the bank the amount of the note with interest accrued thereon, and then brought this action to recover the sum of \$5,603.89, one-third of the amount so paid by the plaintiff. The Realty Corporation became insolvent upon the maturing of the note, and no part of the same had been paid to the bank until the payment made by the plaintiff. The learned Special Term found as conclusions of law that the claim of the bank against the estate of Mingle, deceased, was barred by the short Statute of Limitations, and that the statute operated to discharge the other guarantors from liability claimed by the bank, to the amount of one-third thereof; and that, therefore, the plaintiff was only liable to the bank for the remaining two-thirds of its claim; and, further, that the estate of Mingle having been discharged from liability, by reason

of the Statute of Limitations, it is no longer liable for contributions to his co-guarantors.

We have had some doubts as to the disposition that should be made of this case, owing to an omission in both the allegations of the complaint and the findings of fact. In neither is the date given of the discount of the note by the Chatham National Bank. In each it is stated that the note was delivered before maturity, but the maturity of the note occurred nearly a month after the death of Mingle. If the note was discounted by the bank before the death of Mingle, his estate undoubtedly would be liable, under § 758 of the Code of Civil Procedure. But if the note was purchased after his death, especially if the bank had notice of such death, we do not understand that his estate would be liable. *National Eagle Bank v. Hunt*, 16 R. I. 148-153; *Jordan v. Dobbins*, 122 Mass. 168-170; *Coulthart v. Clementson*, L. R. [5 Q. B. Div.] 42-46; *Pratt v. Trustees of Baptist Society*, 93 Ill. 475. This question, however, does not appear to have been raised upon the trial nor in the Appellate Division. The parties apparently assumed that the note was transferred to the bank before the death of Mingle, and we have, therefore, concluded to dispose of the case upon that assumption.

It is not our purpose to enter upon an extended digest of the cases bearing upon the question involved, for that has been done fully by Justice CLARKE, who wrote the opinion adopted by the Appellate Division. We do not understand that a co-surety or a co-guarantor can step in and pay a claim upon which he has been discharged of liability, by reason of the running of the Statute of Limitations, and then compel contribution by his co-surety or co-guarantor. But so long as he is legally liable upon his guaranty, he may pay the claim and may then seek contribution from his co-guarantors. The statute as to him, does not commence to run until he has paid the claim. Then, and not until such payment, has he the right to exact contributions. This right is founded upon

the general principles of equity, that sureties *in equali jure* must bear the common burden equally, under which the law implies a contract between them to contribute ratably toward discharging any liability which they may incur in behalf of their principal. So long, therefore, as one of their co-sureties remains liable for the principal debt, their liability to contribute continues. It must be borne in mind that while the creditor has nothing to do with the right of the sureties for contribution among themselves, he must not affirmatively do any act tending to impair it. In other words, he must not by his action destroy or impair the rights of sureties as between themselves. If he does, to the extent that he impairs the rights of any one surety, to that extent he diminishes the amount of his recovery against him. But the mere delay to prosecute sureties in the absence of any request to do so does not discharge the surety who may subsequently find himself prejudiced by such delay.

It may be true that the plaintiff, as the president of the Chatham National Bank, gave directions to have the claim prosecuted against Mingle's estate, but the action was not brought until after the Statute of Limitations had run. We do not, however, understand that the bank by this neglect impaired its right to recover the full amount of the note that it held, with the accrued interest thereon. There were two other guarantors, the plaintiff and Thompson. It was not obliged to incur the expense of employing attorneys and prosecuting an action against the estate of the deceased guarantor, but it had the right to call upon the living guarantors to pay the whole amount of the note and then look to the decedent's estate for contribution. This was the procedure adopted by it, and our conclusion is that the Appellate Division has correctly determined the rights of the parties.

It may be true that there is a conflict in the authorities, and that the precise question here presented may not have been determined by the courts of this state. But

the great weight of authorities we think is in favor of the contention of the plaintiff. The leading case upon the subject is doubtless that of *Wood v. Leland* (1 Metc. 387), to which the Appellate Division has alluded. In that case the plaintiff and the defendants' father were both sureties on a bond given by one Harrington upon his appointment as a guardian of minor children. The defendants' father died and his estate was distributed among them. Subsequently the plaintiff, by reason of the default of the guardian, was compelled to pay the amount due the children, and then brought this action to compel contribution by the defendants. The defendants in that case interposed the short Statute of Limitations of one year, provided by the statute of Massachusetts, as a defense. Chief Judge SHAW, in delivering the opinion of the court with reference thereto, says: "The plaintiff in fact was not compelled to pay, and did not pay the amount of such balance, until November, 1838, which was more than one year after the breach of the condition of the bond. Now the defendants contend that as they could not be held responsible to the obligee for such breach of the bond, after one year, so they would not be held liable for a contribution to a surety, after that time. But the courts are of the opinion, that the statute of limitations cannot be so applied. It may well be admitted, that the statute of limitations would be a good bar to an action by the obligee against the heirs and legatees; but the right of action by the surety for contribution does not accrue at the breach of the bond, but upon his payment of the money, pursuant to that breach. The suit against him is not barred in one year. Besides, such suit may be brought within the year, but not come to judgment till long after the year; and he cannot be compelled to pay, until judgment is recovered, although he may pay sooner on demand, after a breach, if he choose to do so. But his right of action for contribution, arises when he does pay, and not before. Notwithstanding a breach, the debt may be

paid by the principal, or relinquished, or compromised, and the surety never compelled to pay. If so, he never has a cause of action against the co-surety or his representatives. The right of action grows out of the original implied agreement, arising out of there being co-sureties, that if one shall be compelled to pay the whole or a disproportionate part of the debt, for which both thus collaterally and provisionally stipulate to be liable, the other will pay such a sum as will make the common burden equal; and in case of the death of either, this obligation devolves upon his legal representatives." This was followed by *Crosby v. Wyatt*, 23 Me. 156; *Sibley v. McAllaster*, 8 N. H. 389; *Peaslee v. Breed*, 10 N. H. 489; *Boardman v. Paige*, 11 N. H. 431; *Aldrich v. Aldrich*, 56 Vt. 324; *Marshall v. Hudson*, 17 Tenn. 57; *Reeves v. Pulliam*, 68 Tenn. 153; *Cawthorne v. Weisinger*, 6 Ala. 714; *Camp v. Bostwick*, 20 Ohio St. 337; *Koelsch v. Mixer*, 52 Ohio St. 207; *Seabury v. Sibley*, 183 Mass. 105; *Martin v. Frantz*, 127 Pa. St. 389, and *Bashford v. Wells*, 96 Pac. Rep. 663; 18 L. R. A. [N. S.] 580, with note.

In the case of *Tobias v. Rogers*, 13 N. Y. 59, the plaintiff sought to hold Rogers, the defendant, as a co-surety upon a bond. Rogers, however, had been discharged in bankruptcy, and it was there held that the defendant was not liable to contribution, for under his discharge in bankruptcy he became discharged of all debts, contracts and engagements provable under the act, and that all persons having uncertain or contingent claims against the bankrupt were forever extinguished, and that this included his liability to contribute to a co-surety. It is, therefore, apparent that this case is distinguishable from the one under consideration.

In the case of *Wagoner v. Walrath* (24 Hun, 443; affirmed without opinion, 92 N. Y. 639) an action was brought against two sureties to a joint undertaking. Both of the sureties were served, but judgment was entered against one only. It was held that such entry of judgment

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released the other surety from all liability and that he could not be called upon to contribute; that the judgment could not be enforced against the surety for more than one-half of the amount of the undertaking. It is true that in the opinion delivered in that case an allusion was made in the case of *Tobias v. Rogers*, containing some statements, the meaning of which had apparently been misunderstood. But even in the *Waggoner case* the conclusion was reached that the amount which one of two sureties could recover of his co-surety is what he has paid in excess of his moiety. See, also, *Morgan v. Smith*, 70 N. Y. 537, and *Board of Supervisors of Monroe Co. v. Otis*, 62 N. Y. 88.

The judgment should be affirmed with costs.

CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur; GRAY, J., absent.

Judgment affirmed.

Form No. 2

Complaint; Contribution; Action by One Guarantor Who Has Paid Amount Guaranteed, Against Executor of Co-Guarantor ¹

Supreme Court, New York County.

<p>George M. Hard, Plaintiff, against Rosa Mingle, as Executrix of the Last Will and Testament of Samp- son Q. Mingle, deceased. Defendant.</p>

The plaintiff, complaining of the defendant, by Steele, Otis & Hall, his attorneys, for a cause of action alleges:

¹ From *Hard v. Mingle*, 206 N. Y. 179; aff'd 141 App. Div. 170; 126 Supp. 51. See *ante*, page 41.

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I. That heretofore and on or about the 20th day of July, 1899, the plaintiff, the defendant's testator, Sampson Q. Mingle, and one Edward Thompson made, executed and delivered to the Chatham National Bank of New York a certain agreement or written instrument of guaranty, of which the following is a copy:

New York, July 20, 1899.

For value received, and for the purpose of giving the Realty Corporation of North America credit at the Chatham National Bank of New York, we hereby jointly and severally guarantee the payment at maturity of all checks, drafts and promissory notes upon which the said Realty Corporation of North America is now or hereafter shall be liable to said bank as maker, endorser, drawer or acceptor to an amount not exceeding fifteen thousand dollars, hereby waiving demand and notice of non-payment thereof, this to be a continuing guaranty.

S. Q. MINGLE.

EDWARD THOMPSON.

GEO. M. HARD.

II. That thereafter, to wit: on or about the 13th day of July, 1903, the said Realty Corporation of North America made its certain promissory note in writing, dated on said day, whereby it promised to pay to one A. H. Gilbert fifteen thousand (\$15,000) dollars, three months after the date of said note, at said Chatham National Bank.

III. That thereafter and before the maturity of said note the said A. H. Gilbert endorsed and delivered the same to the said Chatham National Bank, which received said note for value on the faith of said guaranty hereinbefore set forth.

IV. Upon information and belief, that on or about the 15th day of September, 1903, said Sampson Q. Mingle, one of the guarantors as aforesaid, died leaving a last Will and Testament wherein and whereby he appointed the defendant, Rosa Mingle, as sole executrix.

V. Upon information and belief, that on or about the

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7th day of October, 1903, the said Will was duly admitted to probate by one of the surrogates of the County of New York, in which county said Sampson Q. Mingle resided at the time of his death; and letters testamentary upon said Will were thereafter duly issued and granted by said surrogate to the defendant as sole executrix, and that the defendant thereupon duly qualified as such executrix, and has ever since been and now is acting as such.

VI. That said note was not paid at its maturity nor at any time thereafter until the 20th day of October, 1906, when the plaintiff was compelled to and did on said day pay the same to said Chatham National Bank, the holder thereof, to wit: the sum of fifteen thousand (\$15,000) dollars principal, with interest to said date, amounting to eighteen hundred and eleven and 67-100 (\$1,811.67) dollars, no part of which has been repaid to plaintiff, although he has heretofore duly demanded of the defendant payment of one-third thereof, with interest from the date of said payment.

WHEREFORE the plaintiff demands judgment against the defendant for the sum of five thousand six hundred three and 89-100 (\$5,603.89) dollars, with interest from the 20th day of October, 1906, together with the costs of this action.

STEELE, OTIS & HALL,
Plaintiff's Attorneys,
25 Broad Street, Manhattan,
New York City, N. Y.

[Verification.]

JOHN C. BROCKELBANK, as Trustee of MADALENA B. McADAM, Respondent, v. GEORGE H. McADAM, Appellant ¹

(206 N. Y. 747; aff'g without opinion, 143 App. Div. 928; 128 Supp. 1115, no opinion)

Husband and wife; separation; action on separation agreement

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 15, 1911, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover upon a written agreement of separation.

Charles Maitland Beattie for appellant.

Thomas E. Rush and *Montgomery Hare* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J.; GRAY, HAIGHT, VANN, WERNER, CHASE and COLLIN, JJ.

¹ For complaint in this case, see *post*, page 54.

At the trial the complaint was amended by adding to paragraph IV (p. 56) the following: "except that during the period from July 1, 1896, to and including August 22, 1898, defendant paid under and on account of sums due weekly, pursuant to said agreement, the sum of \$1,550."

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Form No. 3

Complaint; Husband and Wife; Separation; Action on Separation Agreement ¹

Supreme Court, County of New York.

John C. Brockelbank, as Trustee for Madalena B. McAdam, Plaintiff, against George Harrison McAdam, Defendant.	}
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The plaintiff, by his attorneys, Rush & Hare, for his complaint, herein respectfully shows to this court:

I. Upon information and belief, that Madalena B. McAdam was married to the defendant in the City of New York and State of New York on or about the 28th day of February, 1889.

II. Upon information and belief, that for seven years thereafter and until on or about the first day of July, 1896, said Madalena B. McAdam and defendant lived together as man and wife, but that on and before the latter date continued serious differences arose resulting in permanent estrangement. That thereupon the defendant and said Madalena B. McAdam, realizing that there was no probability of reconciliation and that their mutual interest would be best promoted by an agreement to live apart in the future, and desiring to avoid the notoriety of legal separation proceedings, said defendant on or about the first day of July, 1896, duly made and entered into an agreement and stipulation *in writing* with his wife, the said Madalena B. McAdam, to which this plaintiff was a

¹ From *Brockelbank v. McAdam*, 206 N. Y. 747; aff'g without opinion, 143 App. Div. 928; 128 Supp. 1115, no opinion. See *ante*, page 53.

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party, and a copy of said agreement is hereto annexed and made a part of this complaint.

III. That by said agreement the said defendant did covenant, promise and agree to and with the plaintiff herein and with his wife, the said Madalena B. McAdam, that he would permit and suffer the said Madalena B. McAdam, notwithstanding her present coverture, at all times during her natural life, to live separate and apart from him and to reside and be in such place or places and to follow and carry on such trade and business as she, the said Madalena B. McAdam, from time to time at her will and pleasure, should think fit as if she were a femme sole; and that he would permit and suffer the said Madalena B. McAdam at all times to have the sole custody of their daughter, Katherine McAdam; and the said defendant did further covenant, promise and agree that he would not thereafter sue, molest, disturb or trouble the said Madalena B. McAdam for such living separate and apart from him, nor attempt to visit her without her consent, nor visit their daughter, the said Katherine McAdam, except within reasonable hours, as provided by said agreement; and further that he, the said defendant, would well and truly pay or cause to be paid unto his wife, the said Madalena B. McAdam, during her natural life, the sum of fifteen (\$15) dollars per week for the better maintenance and support of herself and their daughter, the said Katherine McAdam, and would pay all doctors', dentists' and medicine bills incurred for the benefit of said daughter. In consideration of which covenants and promises aforesaid on the part of the defendant herein, the said Madalena B. McAdam did promise and agree that she would live separate and apart from the said defendant and would contract no bills in his name for her maintenance and support, but that the said sum of fifteen dollars (\$15) per week should be in full satisfaction of the support and maintenance of herself and daughter, the said Katherine McAdam, and all alimony whatsoever. And the plaintiff

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herein on his part did promise and agree to indemnify said defendant against any liability for the support of the said Madalena B. McAdam and to hold the said defendant safe and harmless from all debts due or demands incurred by the said Madalena B. McAdam, provided the said defendant did perform all the agreements entered into on his part as hereinabove set forth.

IV. Upon information and belief, that thereafter, in pursuance of said agreement, the said Madalena B. McAdam and the defendant herein separated and still continue to live apart, and said Madalena B. McAdam has in no way interfered with the defendant, nor incurred any bills in his name, and has duly and fully done and performed under said agreement on her part, as has the plaintiff in this action, but the defendant herein since about the first day of July, 1898, has wholly failed, neglected and refused to comply with the terms of the aforesaid agreement either by paying doctors', dentists' and medicine bills which have been necessarily incurred for their daughter, the said Katherine McAdam, or by paying the agreed sum of fifteen (\$15) dollars a week, or any part thereof, toward the support and maintenance of his wife, the said Madalena B. McAdam, and said daughter.

V. Upon information and belief, that by reason of defendant's failure to perform said agreement on his part, the said Madalena B. McAdam since about the first day of July, 1898, has been compelled to work and earn sufficient money for the support and maintenance of herself and said daughter, and to pay the sum of seven hundred and fifty (\$750) dollars for doctors', dentists' and medicine bills necessarily incurred for the benefit of said daughter, who is still entirely dependent upon the said Madalena B. McAdam.

VI. That according to the terms and conditions of said agreement the amount due and owing for the support of said Madalena B. McAdam and said daughter, including

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the sum expended by the said Madalena B. McAdam in payment of doctors', dentists' and medicine bills necessarily incurred for said daughter, amounts in the aggregate to the sum of eight thousand two hundred and twenty (\$8,220) dollars.

WHEREFORE, the plaintiff, as trustee for the said Madalena B. McAdam under the agreement aforesaid, demands judgment:

(1) That the defendant be ordered and directed to pay to the plaintiff herein as trustee, with interest on each and every weekly payment due as aforesaid, the sum of eight thousand two hundred and twenty (\$8,220) dollars, being the total amount due under said agreement from about the first day of July, 1898, up to the time of the commencement of this action, which sum also includes seven hundred and fifty (\$750) dollars for doctors', dentists' and medicine bills necessarily incurred.

(2) That said defendant be ordered and directed to continue to pay to his wife, the said Madalena B. McAdam, in accordance with the terms of the agreement dated the first day of July, 1896, as aforesaid, the sum of fifteen (\$15) dollars per week for the maintenance and support of herself and daughter.

(3) That this plaintiff may have such other and further relief in the premises as may be just and the nature of case requires in the course of this action.

RUSH & HARE,
Attorneys for Plaintiff,
30 Broad Street,
New York City.

[*Verification.*]

THIS INDENTURE made this first day of July, 1896, between George H. McAdam of the first part, Madalena B. McAdam, his wife, of the second part, and J. C. Brockelbank as trustee of the said Madalena B. McAdam, of the third part:

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WHEREAS, divers disputes and unhappy differences have arisen between the said party of the first part and his said wife, for which reason they have consented and agreed and hereby do consent and agree to live separate and apart from each other during their natural lives;

THEREFORE, this indenture witnesseth that the said party of the first part in consideration of the premises and in pursuance thereof does hereby covenant, promise and agree to and with the said trustee and also to and with his said wife that it shall and may be lawful for her, his said wife, at all times hereafter to live separate and apart from him, free from his marital control and authority, as if she were sole and unmarried. And that he shall and will allow and permit her to reside and be in such place or places, and in such family and families, and with such relatives, friends and other persons, and to follow and carry on such trade or business as she may from time to time choose or think fit; and that he shall not nor will at any time sue or suffer her to be sued for living separate and apart from him or compel her to live with him; nor sue, molest, disturb or trouble any other person whosoever for receiving, entertaining or harboring her and that he will not without her consent visit her except for the purpose of seeing his and her daughter which he shall be at liberty to do at any time within reasonable hours, but said wife shall have the sole custody of said daughter, Katherine M. McAdam, who shall remain with said wife without any interference whatsoever on the part of said husband, but he shall be consulted as to her education and the said husband shall pay or cause to be paid such sums as he shall be able toward the education of said daughter.

And further, that the said party of the first part shall and will well and truly pay or cause to be paid for and toward the support and maintenance of his said wife and his and her daughter the sum of fifteen (\$15) dollars per week, which the said party of the second part does hereby agree to take in full satisfaction for her and his and her

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daughter's support and maintenance and all alimony whatsoever for the space of one year at the end of which time this agreement may be modified by increasing said amount to be paid per week provided the circumstances of said party of the first part then warrant such increase, except that the party of the first part shall be responsible for doctors' bills and dentists' and medicine bills for the said daughter;

And the said trustee, in consideration of the sum of one dollar to him duly paid and of the due performance of this contract by said party of the first part, does covenant and agree to and with the said party of the first part, to indemnify and hold him harmless of and from all debts of his said wife contracted or that may hereafter be contracted by her on her account; and if the said party of the first part shall be compelled to pay any such debt or debts the said trustee hereby agrees to repay the same on demand to the said party of the first part with all damage and loss that he may sustain thereby.

IN WITNESS WHEREOF, the said parties have hereunto affixed their names and seals the day and year first above written.

GEO. H. McADAM,
MADALENA B. McADAM,
JOHN C. BROCKELBANK,
Trustee.

TUSCARORA LAND AND IMPROVEMENT Co., Plaintiff, v.
JOHN C. MILLAR, et al., Defendants ¹

(206 N. Y. 727; aff'g without opinion, 143 App. Div. 955; 128 Supp. 1148, no opinion)

Watercourses; obstructing stream forming boundary between plaintiff's and defendant's land so as to wash away plaintiff's land and increase that of defendant by accretion

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered March 14, 1911, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to restrain defendants from interfering with the natural flow of the waters of a stream and for damages.

August Becker and *J. Ralph Ulsh* for appellants.

Martin Clark and *Simon Fleischmann* for respondent.

Judgment affirmed with costs; no opinion.

CONCUR: CULLEN, Ch. J.; VANN, WILLARD BARTLETT, HISCOCK, CHASE and COLLIN, JJ. Absent: HAIGHT, J.

¹ For complaint in this case, see *post*, page 66. The following were the findings in this case exclusive of formal parts:

1. That said plaintiff is and was at all the times hereinafter mentioned a domestic corporation, duly organized, with its principal office in the City of Buffalo, N. Y.

2. That said plaintiff is now and has been since the 11th day of January, 1892, the owner in fee of certain lands and premises situate partly in the City of Buffalo and partly in the Town of West Seneca, in the County of Erie, known and distinguished as being a part of lot

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No. 271, township No. 10, range No. 7 of the Buffalo Creek Reservation, according to a certain survey and map thereof, made by James Sperry, and lying on the northeasterly side of Potter's Corners Road, so-called, having a frontage of 1,780 feet on said road, and in depth extending back to and is bounded on its northerly side by the Cazenovia Creek, which is an ancient water course and natural stream.

3. That said Cazenovia Creek is non-navigable and is a swift and violent stream, draining a large section of contiguous lands, and high water therein is frequent, particularly in the spring season of the year.

4. That prior to 1896, said Cazenovia Creek flowed past and by said premises and lands of said plaintiff, without material injury to the same.

5. That since the 11th day of January, 1892, when said plaintiff became the owner of said premises it has been and now is in possession thereof, excepting so much of said premises as have been lost to it by the action of the defendant.

6. That said defendant is now and since October, 1889, has been the owner and in possession of the lands and premises adjoining the said premises of the said plaintiff and on the northerly side of said Cazenovia Creek opposite to said plaintiff's said premises and above the same farther up the creek, said creek being the boundary line between said premises of said defendant and those of said plaintiff; said premises of said defendant being situate partly in the City of Buffalo and partly in the Town of West Seneca in the County of Erie, and known and distinguished as lot No. 36 in township No. 10 and range No. 7 of the Buffalo Creek Reservation of Indian lands, according to a survey and map thereof made by James Sperry, excepting five (5) acres off from the northeast corner of said lot.

7. That in or about the year 1896, the defendant placed temporary impediments, in the nature of deflectors, to the free flow of the water in the channel of said creek causing the same to change its course and direction and wash away the banks of the plaintiff's lands and continued such obstruction to a greater or less degree until the year 1900.

8. That in the fall of the year 1900, said defendant, well knowing the premises, drove and erected or caused to be driven and erected a large number of wooden piles in the bank of lot No. 36, upon her side of the creek and in the natural bed of said Cazenovia Creek, said defendant cutting into the bank to maintain a perfect circle, and extending along and in the channel and the bed of said creek for a distance of 1,035 feet and planked the said piles upon the water side thereof to the height of about 11 feet.

9. That in the year 1901, at the same time when said piling and planking was constructed, said defendant built and constructed, or

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caused to be built and constructed, a wing-dam or deflector at the extreme easterly end of said piling and planking, said wing-dam being constructed of piling driven in the ground with timbers across the face thereof and sheet piling driven in front, said sheet piling being driven into the ground and filled in back of it with solid earth to the bank, and such structure extending into the bed of the creek in front of defendant's land, 40 feet from the top of the bank.

10. That in the summer of 1901, said defendant built, or caused to be built, two certain wooden deflectors, cribs or structures, one at the extreme westerly end of said piling and planking, another about 50 to 75 feet south of it, the same being built in the bank of said creek at which point the earth was excavated for the piles which were laid on the side, drift-bolted together at the points and laid on the ground, and then one built above another to the height of about 10 feet, filled in back of them with gravel, extending out into the bed or channel of the creek from the bank or margin of said creek upon the defendant's side thereof, and into the waters thereof, for the distance of about ten or fifteen feet.

11. That in the late fall of 1902, said defendant built, or caused to be built, three certain other wooden structures, cribs or deflectors, similar in construction to those previously built, one at the distance of about 250 feet south of the extreme westerly end of said piling and planking, and the other two west of the railroad bridge, upon the easterly bank of the creek, upon the defendant's land.

12. That said piling, with the planking thereon, and said log structures so erected and built by said defendant, were and are solid and substantial structures and obstructed and diverted the flow of said creek from its natural bed in which the same was accustomed to flow, especially in times of high water in said creek.

13. Said piling, with the planking thereon, and said structures so built by said defendant, diverted and caused the waters of said creek to flow in an unusual and unnatural course and direction, and to flow upon and strike against the said lands and premises of said plaintiff, upon the opposite side of said creek with great force and volume, and to flow over and to flood the same.

14. That said waters of said creek so diverted and caused to flow against and upon said lands and premises of said plaintiff by said structures so built by said defendant undermined and washed away the bank of said creek upon the plaintiff's side thereof and washed away and carried down the stream large portions and areas of said plaintiff's said lands and premises, to wit: To the amount or extent of about one acre.

15. That said structures so built and constructed by said defendant

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by changing the course and direction of the waters of said creek have extended the banks thereof and widened the said creek between the lands of said plaintiff and said defendant.

16. That said structures so built and constructed by said defendant by changing the course and direction of the waters of said creek have caused said creek to wash away the southerly bank of said creek and have caused an erosion of plaintiff's banks both east and west of the railroad bridge extending across said creek.

17. That said structures so built and constructed by said defendant by changing the course and direction of the waters of said creek have caused the waters of said creek to form a new channel under the railroad bridge extending across said creek.

18. That said structures so built and constructed by said defendant by changing the course and direction of the waters of said creek and by concentrating the force and volume of said waters and the ice carried therein upon and against the trestle structure extending from said railroad bridge to the land to the north thereof, did in the year 1902 carry away, injure and destroy said trestle at one certain point, and in each year thereafter did injure, destroy or carry away said trestle at the same point up to and including the year 1905, when the force and volume of the waters, with the ice carried therein, did wholly carry away and destroy the bridge extending across said creek, and a large part of the said trestle, and did also at the same time injure, destroy and carry away about 250 feet in length of said piling and planking, off from the westerly end thereof.

19. That since the erection and construction of said piling and planking and said deflectors, the said defendant has maintained said structures, and since the commencement of this action, has re-built and re-constructed said piling and planking at the westerly end thereof, to the extent that the same was washed away or destroyed in the year 1905, and thereby has continued to divert the waters of said creek and has changed and is now changing the course and channel of the creek from their natural course and channel, and has caused, and is now causing, the waters of said creek to flow in an increased and excessive volume to the opposite side of said creek, against and upon the lands of the said plaintiff, there situate as aforesaid.

20. That said plaintiff, in October and November, 1902, protested against the erection of said structures by said defendant, and has requested said defendant to remove such obstructions to the natural course and channel of the waters of said creek, which said defendant has failed and refused to do.

21. That in consequences of such obstructions, and the diversion by said defendant of the waters of said creek the same have been, and are

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still, washing into the bank thereof upon plaintiff's side thereof, and undermining and carrying away the lands of the plaintiff and encroaching thereupon.

22. That the said structures so erected by said defendant have been at all times, and are now, a nuisance to said plaintiff, and have caused, and are now causing, great damage and injury to said plaintiff, which is continuous and liable to be repeated and augmented at every time of high water in said creek, unless the said obstructions are removed.

23. That by reason of said structures so built and constructed by said defendant, and the loss of the lands belonging to said plaintiff, which have been so washed away, the said plaintiff has sustained damage in the sum of One thousand dollars (\$1,000) and is liable to sustain other and greater damage.

24. That the damage and injury which said plaintiff has sustained and is now sustaining by reason of said structures so built and constructed by said defendant as heretofore set forth, are and will be continuous and irreparable and impossible to be adequately compensated for in money damage. For which injuries and damage said plaintiff has no adequate or legal remedy to secure said plaintiff in the enjoyment of its rights in said creek and in the waters thereof.

And as conclusions of law, I find and decide:

1. That said structures, said wing-dam and deflectors, and said piling and planking to the extent of 250 feet thereof, measuring from the westerly end thereof, and so much of the remainder as exceeds in height the banks of the creek behind the same, as built, constructed and maintained by said defendant are unlawful, and do wrongfully and unlawfully divert the waters of Cazenovia Creek, and do wrongfully and unlawfully impede and divert the natural flow of said waters and cause the same to flood and wash away the lands of said plaintiff upon the opposite side of said creek.

2. That said structures, said wing-dam and deflectors, and said piling and planking to the extent of 250 feet thereof, measuring from the westerly end thereof, and so much of the remainder as exceeds in height the banks of the creek behind the same, as built, constructed and maintained by said defendant, are in violation of the rights of said plaintiff in said creek, and in the waters thereof, and are in violation of the right of said plaintiff to have the waters of said creek flow uninterrupted in and through its natural channel.

3. That said plaintiff is entitled to a decree enjoining and restraining said defendant from repairing said structures so built and constructed by said defendant, from driving piles and planking the same to form an obstruction to the natural flow of the waters of said creek,

Statement of Case—Findings

and from maintaining such structures, or any other obstruction, to the natural flow of said waters, and from diverting by any means the natural course of said creek, or in any way turning the water of said creek onto the lands of the plaintiff, or causing the water of said creek to flood or wash away the lands of said plaintiff upon the opposite side of said creek, and from interfering in any way with the waters of said creek and the flowing thereof in the natural bed and channel of said creek.

4. That said plaintiff is entitled to a further decree herein commanding and enjoining the said defendant to forthwith remove said wing-dam and deflectors and said piling and planking to the extent of 250 feet thereof, measuring from the westerly end thereof, and so much of the remainder as exceeds in height the banks of the creek behind the same, and any and all other constructions and artificial means built, erected or constructed by said defendant, her agents or servants tending to impede or divert the natural flow of the waters of said creek in and through the natural channel thereof, or tending to turn in any way the water of said creek onto the lands of the plaintiff, or to cause the waters of said creek to flood or wash away the lands of said plaintiff upon the opposite side of said creek.

5. That said plaintiff is entitled to a further decree or judgment herein, adjudging that said plaintiff recover of and from said defendant the sum of \$1,000.00, its damages so sustained by it, by reason of the structures so built and constructed by said defendant, and that said plaintiff have its costs and disbursements of this action to be taxed.

I accordingly direct judgment for said plaintiff and against said defendant for such relief, in accordance with the provisions hereof, with the costs and disbursements of this action to be taxed, which are hereby awarded to the plaintiff and against the defendant.

Let judgment be entered accordingly.

CUTHBERT W. POUND,
Justice Supreme Court.

Complaint

Form No. 4

Complaint; Obstructing Stream Forming Boundary Between Plaintiff's and Defendant's Land so as to Wash Away Plaintiff's Land and Increase that of the Defendant by Accretion ¹

Supreme Court, Erie County.

The Tuscarora Land and Improve-
ment Company,

Plaintiff,

against

Polly J. Mentz,

Defendant.

The plaintiff in the above entitled action, by Martin Clark, its attorney, complains of the above named defendant and for its cause of action alleges:

1. That said plaintiff is and was at all the times herein mentioned, a domestic corporation duly organized with its principal office in the City of Buffalo, N. Y.

2. That said plaintiff is now and has been since the 11th day of January, 1892, the owner in fee of certain lands and premises situate partly in the City of Buffalo and partly in the town of West Seneca, in the County of Erie, known and distinguished as being a part of lot No. 271, township No. 10, range No. 7, of the Buffalo Creek Reservation, according to a certain survey and map thereof made by James Sperry, and lying on the north-easterly side of the Potters Corners Road so called, having a frontage of 1,780 feet on said road, and in depth extending back to and is bounded on its northerly side by the Cazenovia Creek; that said creek is non-navigable and is

¹ From *Tuscarora Land & Improvement Co. v. Millar* (individually and as executor of Polly J. Mentz, deceased), 206 N. Y. 727; aff'g without opinion, 143 App. Div. 955; 128 Supp. 1148, no opinion. See *ante*, page 60.

Complaint

a swift and violent stream; that it drains a large section of contiguous lands, and high water therein is frequent particularly in the spring season of the year; that prior to the wrongs and injuries by the defendant hereinafter complained of, said creek flowed past and by said premises and lands of said plaintiff without material injury to the same; that since the 11th day of January, 1892, when plaintiff became the owner of said premises, it has been and now is in possession thereof, excepting so much of said premises as have been lost to it by the action of the defendant as hereinafter alleged:

3. That said defendant is now and at all the times herein mentioned, has been and is the owner and in possession of the lands and premises adjoining the said premises of said plaintiff and on the northerly side of said Cazenovia Creek opposite to said plaintiff's said premises and above the same farther up the creek, said creek being the boundary line between said premises of said defendant and those of said plaintiff; said premises of said defendant being situate partly in the City of Buffalo and partly in the town of West Seneca in the County of Erie and known and distinguished as lot No. 36 in township No. 10, and range No. 7 of the Buffalo Creek Reservation of Indian lands, according to a survey and map thereof made by James Sperry, excepting five (5) acres off from the northeast corner of said lot.

4. That heretofore and in or about the year 1890, said defendant well knowing the premises, wrongfully and unlawfully drove and erected or caused to be driven and erected, a large number of wooden piles in the bed and into the waters of said Cazenovia Creek and extending along and into the waters and into the bed of said creek for a distance of about 1,010 feet and planked the said piles to the height of about 10 feet, and did also thereafter construct and erect or caused to be constructed and erected, certain wooden cribs or structures of logs backed with earth extending out from the bank or margin of said

Complaint

creek upon the defendant's side thereof into the waters thereof at five certain separate points or places, each of said structures extending into the said creek to the distance of twenty (20) feet or more; that said piling with the planking thereon and said log structures so erected by said defendant, were solid and substantial structures and obstructed and diverted the flow of said creek from its natural bed in which the same had flowed from time immemorial and rendered the bed of said creek too narrow and insufficient for the flow thereof, especially in times of high water in said creek, and said structures diverted and caused said waters to flow in an unusual and unnatural course and direction and to flow upon and strike against the said lands and premises of said plaintiff upon the opposite side of said creek, with great force and violence and to flow over and to flood the same; that said waters so diverted and caused to flow against and upon said lands and premises of said defendant, under-mined and washed away the bank of said creek upon the plaintiff's side thereof and washed away and carried down the stream, large portions and areas of said plaintiff's said lands and premises, to wit, to the amount or extent of about three acres, and thereby added about three acres to the other side of the creek opposite to that of the plaintiff, of which said defendant now claims to be the owner and in possession, and did also accumulate upon said lands upon the side of the creek opposite to the lands of the plaintiff, each year, a large quantity of gravel of great value to which said defendant claims to be the owner, and which said defendant or her agents or servants have each year removed and which said gravel was washed away from the lands of said plaintiff and carried over and upon the opposite side of said creek; that ever since the erection and construction of said piling and planking and said log structures the said defendant has wrongfully and unlawfully maintained said structures and thereby has continued to divert and is now diverting the waters of said

Complaint

creek from running in their natural course and channel and has caused such waters to flow in an increased and excessive volume to the opposite side of said creek against and upon the lands of the plaintiff there situate as aforesaid, although requested by the plaintiff to remove such obstructions and to discontinue such diversion of the waters of said creek, which said defendant has failed and refused to do; that in consequence of such wrongful and unlawful obstructions and diversion of the waters of said creek, the same have been and are still washing into the bank thereof upon plaintiff's side thereof and under-mining and carrying away the lands of the plaintiff and encroaching thereupon; that the said piling and planking and said log structures so erected by said defendant have been at all times and are now a nuisance to said plaintiff and by reason thereof, great damage and injury to said plaintiff is being caused and the same is continuous and liable to be repeated and augmented at every time of high water in said creek unless the said obstructions are removed; that in consequence of the premises, said plaintiff has sustained damages in the sum of fifteen thousand (\$15,000) dollars, and is liable to sustain other and greater damage; that the damage and injury which said plaintiff has sustained and is now sustaining by reason of said defendant's wrongful and unlawful acts herein set forth, are and will be continuous and irreparable and impossible to be adequately compensated for in money damages.

5. That during the last season, a large part of said piling and planking so erected by said defendant, has been broken or damaged by force of the water in said creek to such an extent that said defendant has within a short time removed some of said piling and planking and has driven new piles into the bed and in the waters of said creek, and is now engaged in planking the same and reconstructing the said structures herein above described, notwithstanding notices forbidding the same, served upon said defendant by said plaintiff, that said defendant cease

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to continue such work and building of said structures, to the great and irreparable damage and injury of said plaintiff, for which injuries and damages, said plaintiff has no adequate or legal remedy to secure said plaintiff in the enjoyment of its right to have the waters of said creek flow in their natural channel.

Wherefore, said plaintiff demands judgment against said defendant, adjudging and declaring the diversion of the waters of said Cazenovia Creek and the obstructions formed by said piles and planking and structures built and maintained by said defendant, impeding and diverting the natural flow of said waters and causing the same to flood and wash away the lands of said plaintiff upon the opposite side of said creek, to be unlawful and in violation of the right of said plaintiff to have the waters of said creek flow uninterruptedly in and through its natural channel;

Also adjudging and declaring that said defendant, her agents and servants be forever enjoined and restrained from rebuilding and repairing the piling and planking constructed by said defendant along and in the waters and bed of Cazenovia Creek and from continuing and completing the work now carried on by them, from driving piles and planking the same to form an obstruction to the natural flow of the waters of said creek and from maintaining such piles, planking and structures of logs backed with earth or any other obstructions to the natural flow of said waters and from diverting by any means, the natural course of said creek or in any way turning the water of said creek on to the land of the plaintiff or causing the water of said creek to flood or wash away the lands of said plaintiff upon the opposite side of said creek and said plaintiff complains for an order that during the pendency of this action, the defendant be enjoined and restrained from the acts aforesaid.

Also adjudging and directing that said defendant forthwith remove said piles and planking and said structures

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of logs backed with earth and any and all other constructions and artificial means built, erected or constructed by said defendant, her agents and servants in any way tending to impede or divert the natural flow of the said waters in and through the natural channel of said creek or tending to turn in any way the water of said creek onto the lands of the plaintiff, or to cause the waters of said creek to flood or wash away the lands of said plaintiff upon the opposite side of said creek;

Also adjudging and directing that said defendant forthwith restore said creek to its original natural channel and course as it existed prior to the time that its course was interfered with by said defendant and its bed or channel altered and changed by the action of said defendant;

Also, adjudging that said plaintiff recover of and from said defendant, the sum of fifteen thousand (\$15,000) dollars, and such other or further damages as may accrue to it pending this action as and for the damages sustained by said plaintiff by reason of the wrongful and unlawful acts of said defendant; and that the plaintiff may have such other or further relief in the premises, besides the costs of this action, as shall be equitable and just.

MARTIN CLARK,
Attorney for the Plaintiff,
No. 91 Erie Co. Sav. Bank Bldg.,
Buffalo, N. Y.

[Verification.]

JOSEPH E. CHASE, Respondent, *v.* GENERAL ELECTRIC
COMPANY, Appellant ¹

(206 N. Y. 723; aff'g without opinion, 145 App. Div. 899; 129 Supp.
1115, no opinion)

**Negligence; employe of independent contractor working inside a
conveyor chute when fire negligently started in chute burning
the plaintiff**

Appeal from a judgment of the Appellate Division of
the Supreme Court in the Third Judicial Department,
entered May 8, 1911, affirming a judgment in favor of
plaintiff entered upon a verdict in an action to recover
for personal injuries alleged to have been sustained by
plaintiff through the negligence of defendant.

Lewis E. Carr and *James O. Carr* for appellant.

Joseph A. Lawson for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: GRAY, WERNER, WILLARD BARTLETT, HIS-
COCK, CHASE and COLLIN, JJ. Absent: CULLEN, Ch. J.

¹ For complaint in this case see *post*, page 73. For charge of trial
judge, see *post*, page 77.

Complaint

Form No. 5

**Complaint; Negligence; Employe of Independent Contractor
Working Inside Conveyor Chute Burned by Negligent Lighting
of Fire in Chute ¹**

Supreme Court, Schenectady County.

Joseph E. Chase,	}
Plaintiff,	
against	
General Electric Company,	
Defendant.	

The above named plaintiff for an amended complaint herein complains of the above named defendant, and alleges:

I. That at all the times hereinafter mentioned the defendant was, and still is a domestic corporation duly organized under and in pursuance of an Act of the Legislature of the State of New York entitled "An Act to incorporate the General Electric Company," and having the principal office for the transaction of its business at the City of Schenectady, in the County of Schenectady, and State of New York.

II. That on or about the 8th day of May, 1909, the defendant was the owner, and in possession, of premises and the buildings thereon situated in said City of Schenectady and known as "the General Electric Works." That on said premises, and connected with said buildings, was a concrete construction plant maintained, operated, used and owned by said defendant for the incineration of inflammable refuse. That said plant consisted, among other things, of a concrete tower, stack, or conveyor chute about forty (40) feet in height, having immediately

¹ From *Chase v. General Electric Co.*, 206 N. Y. 723; aff'g without opinion, 145 App. Div. 899; 129 Supp. 1115, no opinion. See *ante*, page 72. For charge see *post*, page 77.

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beneath it, and about eight (8) feet distant from its lower extremity, a large furnace containing openings in the top thereof into which inflammable refuse was thrust for the purpose of incineration, and one of which openings was directly, or nearly directly, underneath the lower extremity of said concrete conveyor chute. That at the upper extremity, or top of said tower, stack, or conveyor chute, a large pipe or blower was inserted, which pipe or blower conveyed inflammable refuse from other portions of the premises of defendant to, into, and through said conveyor chute to the top of said furnace immediately beneath the same. That the only openings in said concrete conveyor chute were, one opening about fourteen (14) inches in diameter in the top thereof and one opening about twenty-four inches square in the bottom, or hopper, end thereof and immediately above said furnace.

III. That at or about 8 o'clock a. m., of said 8th day of May, 1909, plaintiff, a journeyman carpenter, was in the employ of one Andrew Kinum, a contractor, and that said contractor was then employed by defendant to remove the wooden forms, or moulds, with which said concrete conveyor chute was then lined, and was then engaged in such employment. That said Kinum, at said time, directed plaintiff, with others, to enter said conveyor chute at the lower extremity thereof by means of a ladder extending from the top of said furnace up into said conveyor chute and then and there to assist in the removal of said wooden forms, or moulds, with which said chute was lined as aforesaid. That, in pursuance of said direction of said Kinum, plaintiff entered said chute. That at the time plaintiff entered said chute, all of said manholes in the top of said furnace were closed, and plaintiff was not informed, and had no knowledge, of the existence of a fire in said furnace. That said chute was then filled with scaffolding, supports and braces by means of which plaintiff ascended to the top of said chute, where the work of removing said wooden forms, or moulds, was to

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begin. That the sides of said chute, said scaffolding, supports and braces, and said ladder by which plaintiff entered said chute, were covered with inflammable refuse.

IV.. That after plaintiff had been at work in said chute a short time, and while working at, or near, the top thereof, he observed smoke below him. That he immediately descended toward the opening at the bottom of said chute, and made his escape therefrom by means of the ladder by which he had entered. That, as plaintiff has since been informed and believes, there was a fire burning in said furnace at the time plaintiff entered said conveyor chute, which fire had been kindled, and was maintained, by the defendant, its agents and servants, and that said defendant, its agents and servants well knew of the presence of the plaintiff in said conveyor chute at said time and place as aforesaid. That, as plaintiff is informed and believes, the defendant, by its agent or servant, opened, or caused to be opened, by the removal of the cover therefrom, said manhole in the top of said furnace at, or near, the lower extremity of said conveyor chute while said plaintiff was employed in said conveyor chute as aforesaid, and stirred, or caused to be stirred, said fire in said furnace, and that the sparks or flames, from said furnace were thereby caused to ascend through said manhole, upward, to and into said concrete conveyor chute. That during his descent the interior of said chute became filled with flames and smoke, which flames, as plaintiff is informed and believes, were communicated to the interior of said chute from fire in the furnace immediately below the same by reason of the opening of said manhole as aforesaid. That while descending and escaping from said chute plaintiff, without any negligence on the part of said plaintiff, suffered personal injuries and damage consisting of burns of the face and hands, and loss of clothing by burning, and that by reason of such personal injuries plaintiff suffered great agony and pain, and still suffers agony and pain, and, as plaintiff is informed and believes,

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the hands of plaintiff are permanently injured, and that plaintiff has been unable ever since to attend to his usual vocation, and has been put to great trouble and expense in trying to heal his said injuries, which said injuries are still unhealed and uncured.

V. That said injury and damage to plaintiff was caused solely by reason of the carelessness, recklessness and negligence of the defendant, its agents and servants; and by reason of the carelessness, recklessness and negligence of the defendant, its agents and servants, as plaintiff is informed and believes, in building, permitting to be built, and maintaining a fire in said furnace directly beneath said concrete conveyor chute, while plaintiff was employed therein, which employment of plaintiff therein at said time and place defendant well knew, and the inflammable character of the material adhering to the sides of said chute, to said scaffolding, and framework therein, and to said ladder at the lower entrance thereof, and by carelessly, recklessly, and negligently opening said man-hole as aforesaid, as hereinbefore alleged; and by reason of the carelessness, recklessness and negligence of the defendant, its agents and servants, in not providing and maintaining a reasonably safe place in which plaintiff was to work, and plaintiff further alleges that said injury and damage as aforesaid was caused without any fault, or act of omission or commission on the part of said plaintiff contributing in any way or manner thereto.

VI. That by reason of the facts so stated and alleged as aforesaid, the plaintiff has sustained damages to the amount of twenty thousand (\$20,000.00) dollars.

WHEREFORE, the plaintiff demands judgment against the defendant for said sum of twenty thousand (\$20,000) dollars, and for costs.

JOSEPH A. LAWSON,
Attorney for Plaintiff,
Room 43, Tweddle Building,
Albany, N. Y.

[Verification.]

Charge

CHARGE OF TRIAL JUDGE¹

VAN KIRK, J.: Gentlemen of the Jury—It is because when cases are brought into court they are decided in an orderly way and because juries find their verdicts in accordance with the law of our State that our fellow citizens know how to do their business safely. Our citizen is entitled to know what the rule of law is concerning certain conduct, and it is necessary that the courts should uniformly hold that rule of law to be right so that there may be consistency and safety in doing business. It is to bring about that end that we hear the evidence in a case to instruct us about the facts, that we hear the attorneys sum up the case to call our attention to what they recall the evidence to be and the inferences that they think you should draw from that evidence, and that the court instructs you as to the law, so that when you have found the facts you may bring in a verdict according to the law that governs the case. Jurors are not expected to be skilled in the law. They have not had the opportunity to learn. They are called here because they are men of ordinary affairs of various kinds in the State, to judge what certain evidence establishes as to facts and to apply those facts as the court instructs them to the law of a case, without regard to anything else than that evidence and that law.

Gentlemen, it is necessary for you now to give as close attention as you can to the instructions of the court, so that when a verdict is brought in it will be a verdict that is right and just under the facts and the law of the State of New York which we are all bound to support.

There should be no misunderstanding that the rules of liability in cases of this character are just the same

¹ From *Chase v. General Electric Co.*, 206 N. Y. 723; aff'g without opinion, 145 App. Div. 899; 129 Supp. 1115, no opinion. See *ante*, page 72. For complaint from this case, see *ante*, page 73.

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whether the defendant is a man who owns a farm or grist mill or any manufacturing plant, or whether it be a corporation; each has just the same rights; the rule of law is identically the same. This plaintiff has a right in here as a plaintiff to come in and ask that his rights be given him; and this defendant has just the same rights as any one of our fellow citizens has to come here and ask that its rights should be defended—just the same—and the courts and the jurors must uphold those rights.

Gentlemen, you have heard me deny a motion for a non-suit. It is sometimes inferred, but it must not be, that when the court denies that kind of a motion it says that the plaintiff, in effect, has a cause of action and should succeed. It does not mean that at all. It simply means that as a naked question of law the court cannot dispose of the case, because the jury has the sole right to pass upon every question of fact, where different inferences may be drawn from the evidence, and the court cannot take away from the jury that right any more than the jury can take away the right of the court to say what the law is. That ruling simply means that there are questions of fact that must be determined by you twelve men before this case can be decided.

Under our laws a man cannot merely make a proposition or claim and secure a recovery. He must prove that his claim is true. That is for the protection of people in our State. Charges are easily made. In court, in order to recover against a defendant, the charges must be proved and the burden of that proof rests upon the plaintiff; and the chief part of your duty here to-day will be to determine whether or not the plaintiff has produced evidence which satisfies your mind that the matters which the court will tell you he must prove, are facts, in order to recover.

The action is a negligence action as it is commonly spoken of, the plaintiff suing the defendant because he claims that this defendant was at fault and responsible for the injuries he received. If it was at fault, then the

Charge

plaintiff is entitled to recover; if it was not at fault within the meaning of the law, then the plaintiff is not entitled to recover however seriously the unfortunate man was injured. In order to know whether there was negligence, it is necessary for you to know what the rule of duty is, what duty this defendant owed to this plaintiff, because, if there is negligence here, it is because the defendant failed to perform the duty which it owed to this plaintiff. If it performed its duty as the law required it, there was no negligence; if it did not perform its duty and that failure to perform it caused these injuries, then there was negligence and there is a right to recover in this respect.

This defendant was not the employer of the plaintiff. If you have ever heard cases tried where a man in the employ of some other man or company brought the action, the rules that governed liability there do not govern here. This defendant was a party owning property in Schenectady upon which Mr. Kinum had made a contract to erect this conveyor, with perhaps other things, the upper part of the conveyor to be of concrete—that work he was to do—and the lower part funnel shaped, some twelve feet long, was to be of steel. Mr. Kinum was an independent contractor so far as that work was concerned, and it was the doing of that work that brought this plaintiff there employed by Mr. Kinum and under the direction of Mr. Kinum's foreman, Mr. Whitman. The defendant had nothing to do with directing this plaintiff where to work or when to work or how to work. This plaintiff, however, had a perfect right to be there because he was employed by the contractor, Mr. Kinum, and Mr. Kinum had to be there to do his work, had a right to be there to do his work with his men. So that the plaintiff was rightfully there at the time this accident occurred. Being rightfully upon the premises of the defendant, the law of our State is that it was the duty of the defendant to use reasonable prudence and care to keep its property in such condition that it would not expose this plaintiff to any unreasonable or

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unnecessary danger. I think you all understand me. It was the duty of the defendant to do nothing which would expose this plaintiff to unreasonable or unnecessary danger if the prudence and care of a man of ordinary understanding would have warned it of the danger.

Gentlemen, you know now just what all the circumstances were there. It was the fire that caused the burning and the injuries. The first question for you to determine is what caused the fire. By the fire, I refer to the burning up in the conveyor; I do not refer to the fire down in the furnace. You must first determine what it was that caused that fire, and there you will take into account the evidence in the case. It is not my place to suggest to you what the court thinks about the evidence, for that is no matter or concern here now to you. It is for you to say what that evidence satisfies your mind to be the fact. You will take all the circumstances together; what was it that caused that blaze to go up through that conveyor. The plaintiff claims that it was by removing one of the covers from one of the fire holes and that the blaze came up and ignited the shavings or the sawdust or whatever it was. Gentlemen, you have heard the testimony of one man saying that he saw one down there opening the cover. You have heard the testimony of the men who were there saying that the cover was not off. The only men employed there were fifty feet away when the fire started. Gentlemen, you cannot guess, you haven't a right merely to suspect that a thing is so. In court that which you conclude to be so must be a fair inference, a fair conclusion from the evidence that you have heard. If it was something else than the opening of the fire hole, if there was something unexpected occurred there, that caused this fire, it might not have been at all the responsibility of the defendant. The defendant had the fire in this furnace. Of course, the defendant, as an individual, does nothing; whatever it does do it does through the men that it employs. Did the employes of the defendant open that and

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cause this fire, or was it the burning of a match, or was it because something became heated there unexpectedly on the top of the furnace? What was it? You must decide that fact.

When you have decided what caused the burning up through this conveyor, then you must go one step further and determine whether or not there is liability, because the care that the defendant must use is the reasonable care of a reasonable man, a man who appreciates conditions and would anticipate that a certain thing might result from certain circumstances. A corporation is no different than anyone else in the instruments used to do business. It must be done by men. You, as jurors, have no right to look back from now and say that having found how that fire occurred you can see plainly enough that this ought to have been done or that ought to have been done to have avoided it. Few of us are so dull that after a thing has occurred we could not tell what thing done would have avoided that accident; but the defendant and its employes were only bound to see things as they were at the time of and just before the accident. When you have determined what it was that caused the fire, you must determine whether or not that thing would have been anticipated before the accident by a reasonable man under all the circumstances and conditions there. If it would not have been anticipated, then it was not negligence to have failed to avoid it. If it would have been so anticipated, then it is a violation of the duty that it was not so anticipated.

Gentlemen, when a party owning real estate permits other people to come on its real estate, it is not bound to stop its business, it is not bound to put its property in a condition different than it ordinarily is to protect that person, unless it would be naturally anticipated that by going on and doing that business you were going to expose to unreasonable and unnecessary danger a person that you know is going there rightfully to do something.

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The mere fact of having a fire in this furnace, if an ordinary man would not have anticipated that, it would have caused the accident that occurred that day, is not the violation of any duty upon the part of the defendant to the plaintiff.

Gentlemen, after you have found what caused the fire, provided the evidence has disclosed it to you—if it has not disclosed it to your satisfaction, then you must not conclude what did it; it is a matter of proof—after you have done that, if you found that that thing occurred because of the negligence of this defendant under the rules that I have given you, then you will determine whether the plaintiff, by using reasonable care, could have avoided or should have avoided this accident. A man cannot recover for negligence if his own carelessness brings on the injury. He is bound to use his reasonable understanding of things to protect himself against injury just as much as a defendant, which owes him a duty, is bound to perform it. Every man who works for another man owes that man a duty under our law to exercise reasonable care and prudence to see that he does not get hurt. Mr. Chase has said that he did not know there was a fire down there and did not realize any danger, in effect, as I remember it, but you will recall his evidence and be guided only by your own recollection of it. If he did know the conditions there as he knew that the light shavings and sawdust and so forth were there, and there was liable to be a fire, and went up there, then you would say whether or not he did not bring this on himself because he could easily have avoided it by calling somebody's attention to it. If he was careless and brought on this injury, then he cannot recover. If he was not careless, it has no bearing upon the case.

Gentlemen, plaintiff was working for Mr. Kinum. Mr. Kinum was the one who was bound to furnish him a safe place to work in, bound to give him safe orders and directions, bound to see that there was reasonable care

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used to protect him against being injured. Mr. Whitman was his foreman and he gave certain directions about stopping the blower for instance, and it was stopped. If it was the negligence of his employer, Mr. Kinum, which was the proximate, as they call it, the near cause, of this injury, the cause without which it would not have occurred, then this defendant is not responsible for Mr. Kinum's negligence. It would not be fair or just for the court to give an award against this defendant for a wrong, a violation of duty which Mr. Kinum, as the employer, owed to this plaintiff. So that if you find that it was the negligence of the defendant, not the negligence of the plaintiff, and not the negligence of Mr. Kinum, then you would have found upon the facts in favor of the plaintiff. If you find, however, that it was not negligence upon the part of this defendant to have had things as they were, if you find that the accident occurred because of the negligence of Mr. Kinum, the employer, or on account of the negligence of Mr. Chase, then there is no cause of action and you will not go to the question of damages. I have no right to assume what your verdict will be upon that question as to whether there is a right to recover, and therefore it is necessary for me to instruct you as to the rule of damages, in case you should find damages, so you would know what the rules are for the amount of recovery.

The rule is that such damages only shall be allowed in a case of this kind as will compensate the plaintiff for the injuries he received as a result of this affair, this accident that occurred there, compensatory damages, such damages as will stand in the place of those injuries. Nothing to be given beyond that, nothing like punitive damages or mulcting anyone of exemplary damages because there is no charge here that there was any wilful wrong done.

So that you will first determine, if you come to the question of damages, what injuries he received as a result of the accident. You will then determine the suffering, the pain, that he received, the time that he was laid up

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with loss of wages when he could not earn. You will put upon those elements the sum of money, not that you would take to be put in his place, that is not right, the sum of money that you say would compensate him for that loss and suffering, and if you find for the plaintiff that sum of money would be the amount of your verdict. Upon the other hand, if you decide for the defendant, your verdict would be a verdict of no cause of action.

JOHN J. LEAHY, Plaintiff, v. FRANK KEMLEIN AND CHARLES KEMLEIN, Individually and as Administrators with the Will Annexed of the ESTATE OF HENRY KEMLEIN, Deceased, Defendants ¹

(Supreme Court, Kings County, Special Term, April 18, 1913)

Equity; real property; lost deed; suit to quiet title and to compel giving of new deed by heirs of grantor; motion to strike out as irrelevant and to separately state and number causes of action

1. A suit in equity to establish the record title of real property on the ground that a deed to the plaintiff's grantor is unrecorded and is lost may be maintained without an allegation of possession in the plaintiff and irrespective of the provisions of the Code of Civil Procedure relating to actions to quiet title, but the fact that possession is alleged does not destroy the right to equitable relief.
2. Where a complaint states facts entitling the plaintiff to equitable relief to quiet title and also to relief under Code Civ. Pro., §§ 1638 *et seq.*, a motion to compel the plaintiff to separately state and number his causes of action should be denied.
3. When the facts are concisely and clearly stated in a complaint the court will not too curiously inquire into the matters alleged to discover by a careful analysis whether some of the facts alleged are not merely evidentiary rather than the ultimate facts which should be contained in a complaint.

¹ For complaint from this case see *post*, page 86.

Opinion of the Court

Motion by the defendants to strike out certain portions of the complaint as irrelevant and to compel the plaintiff to separately state and number causes of action.

Denied.

Williams, Folsom & Strouse for the plaintiff.

George J. Gruenberg for the defendants.

BLACKMAR, J.:

There is but a single cause of action because there is but a single right which the plaintiff seeks to enforce, viz., the right to establish his record title to the land in question. There may be more than one remedy—the remedy afforded by an action in equity and the remedy afforded under § 1638 of the Code. Under our system of pleading, the complaint should contain nothing but a statement of the facts constituting the cause of action and the demand for relief. It is not necessary or proper to set forth any theories in the complaint. The pleader is not required to say whether he is suing in law or in equity, under a statute or at common law. He must confine himself to a statement of the facts. The allegations in the complaint determine whether the case shall be tried before a court consisting of a judge and jury or before a court consisting of a judge alone. The application of the law to the facts alleged and proved determine the relief to which the plaintiff is entitled. If this complaint had not alleged possession in the plaintiff it would have been good under a well established head of equity without the aid of the statutory scheme of relief. The fact that it does allege possession does not destroy the cause of action alleged in equity. Neither does the prayer that defendant give a deed impair the complaint under § 1638 of the Code. The last clause of § 1639 of the Code authorizes any demand for appropriate relief. The very purpose of our reformed procedure, which, unfortunately, has been lost sight of in

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part by reverter to worn out theories of actions, is to do away with all technicality and to establish one form of action only, so that the rights of the parties may be determined on the facts as they exist without regard to forms. The motion to compel plaintiff to separately state two causes of action is denied. The complaint states the facts clearly and concisely. Whether an accurate analysis would determine that some of the facts alleged are evidentiary matters and not the ultimate facts should not, in view of the general excellence of the complaint, be too curiously inquired into. Motion denied, with costs.

Form No. 6

Complaint; Equity; Real Property; Lost Deed; Suit to Quiet Title
and to Compel Giving of New Deed by Heirs of Alleged Grantor ¹

Supreme Court, Queens County.

John J. Leahy, Plaintiff, against Frank Kemlein and Charles Kemlein, individually and as administrator of the will annexed of the estate of Henry Kemlein, deceased, Defendants.	}
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Plaintiff by Williams, Folsom & Strouse, his attorneys,
for an amended complaint, alleges:

1. That on and prior to the 31st day of May, 1907, this plaintiff and one Henry Kemlein, were co-partners in business, doing business under the firm name and style of

¹ From *Leahy v. Kemlein*, ante, page 84.

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Kemlein & Leahy, and were engaged in business in Long Island City in the Borough of Queens, City and State of New York.

2. That, prior to the said 31st day of May, 1907, this plaintiff and said Henry Kemlein purchased a certain piece or parcel of land with the buildings and improvements thereon erected, and which is more particularly described as follows, viz.:

ALL those lots of land in Long Island City, Queens County, New York, which on a map entitled "Map of property belonging to the Standard Oil Company of New York, situated in Long Island City, Queens County, New York, July 1892," made by Smith and Weston, Civil Engineers and City Surveyors, City of Bayonne, N. J. and filed or intended to be filed in the office of the Clerk of Queens County, are known and designated by the lot numbers 1, 2, 3, 4, 5, 6, 7, and 8 in Block number 176, and are bounded as follows: Northerly by 13th (thirteenth) Street on said Map, Easterly by Hancock Street on said map; Southerly by other lands in said Block number 176 and Westerly by Hamilton Street and Vernon Avenue on said Map; said Southerly boundary being a line drawn parallel with, and one hundred feet southerly from the southerly side of Thirteenth Street—being the same premises conveyed to Robert Russell and John Muno by deed dated October 3, 1894, and recorded in the office of the Clerk of Queens County in Liber 1041 of Deeds, page 141, on October 9, 1894, from the Standard Oil Company of New York, and being the same premises conveyed to Lincoln Iron Works, by John B. Merrill, Referee by deed dated December 18, 1899, and recorded in said Clerk's office of the County of Queens on December 22, 1899, in Liber 1227 of deeds, page 275, together with all the buildings and improvements thereon.

3. That the said real estate so conveyed and assigned to this plaintiff and to said Henry Kemlein was for the use and benefit of the said firm or copartnership of Kemlein

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& Leahy, and from the time of its purchase by them was occupied by said firm in their business and the purchase price of said premises was paid by said firm out of their co-partnership assets, and the taxes and carrying charges of said property were paid by the said co-partnership also from their co-partnership assets, and said real estate was held by them as co-partners, and was a portion of the assets of the said firm or co-partnership.

4. That on or about the 31st day of May, 1907, this plaintiff and the said Henry Kemlein caused to be formed a corporation, under and pursuant to the laws of the State of New York, for the purpose of taking over all of the business and assets of the co-partnership of Kemlein and Leahy, and assuming all of the debts and obligations of said co-partnership and of carrying on and conducting the business theretofore carried on and conducted under the firm name and style of Kemlein and Leahy, and on or about said 31st day of May, 1907, the said firm of Kemlein and Leahy did transfer and assign to the said corporation Kemlein & Leahy, Inc., all of the assets of the said co-partnership of Kemlein and Leahy, and the said corporation did thereupon assume and agree to pay all of the debts and obligations of the firm of Kemlein & Leahy, and that the said parcel of land and real estate, hereinbefore described, was included in the assets of the said co-partnership to be transferred and conveyed to the said corporation.

5. That on or about the 31st day of May, 1907, this plaintiff and the said Henry Kemlein duly made, executed, acknowledged and delivered to the corporation Kemlein and Leahy, Inc., a full covenant, warrantee deed conveying to said corporation in fee simple forever, the land, real estate and improvements hereinbefore described, subject to the liens and encumbrances thereon and that the said corporation at that time became the owner and entered into possession thereof and at all times since, up to the 9th day of August, 1911, occupied the same, and at all

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times since said 31st day of May, 1907, to the 9th day of August, 1911, enjoyed undisputed possession thereof.

6. That thereafter, and on or about the 26th day of December, 1909, the said Henry Kemlein died, leaving him surviving, as his only heirs at law and next of kin, and the only persons entitled by law to share in his estate, the defendants Charles Kemlein and Frank Kemlein, his brothers.

7. That on or about the 17th day of January, 1910, the defendant, Charles Kemlein, was, by the Surrogate of the County of New York, in which County the said Henry Kemlein resided at the time of his death, duly appointed administrator with the will annexed of the estate of said Henry Kemlein, deceased, and duly qualified as such and entered upon his duties as such administrator.

8. That the sole legatee and devisee under the Last Will and Testament of the said Henry Kemlein was his wife, Dorothy Kemlein, who died prior to the 31st day of May, 1907.

9. That on or about the 9th day of August, 1911, the corporation Kemlein and Leahy, Inc., duly made, executed, acknowledged and delivered, under its corporate seal and by a duly authorized officer, to this plaintiff, a full covenant warranty deed, conveying to this plaintiff in fee simple forever, the said real estate and improvements hereinbefore described, subject only to the conditions and incumbrances therein referred to, and this plaintiff thereupon entered into possession of said premises and at all times since said day has had and now has possession thereof, and that said property at the time of the commencement of this action was, and for the one year next preceding, had been in the possession of this plaintiff as sole tenant.

10. That the deed of conveyance made, executed and delivered by Henry Kemlein and this plaintiff to the corporation Kemlein & Leahy, Inc., on or about the 31st day of May, 1907, was not recorded in the office of the

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Clerk of the County of Queens and the same was lost and although careful and diligent search therefor has been made, it has not been found and this plaintiff does not know where the said deed is, and that it is and will be impossible for plaintiff to record or cause said deed to be recorded.

11. That it appears from the public records, that said Henry Kemlein at the time of his death, had title to an interest or share in said real property, and that said interest, title or share still remains in him, and that the defendants might unjustly claim an estate or interest therein as his heirs at law.

12. That by reason of the premises and by reason of the fact that there is on record no deed or conveyance by the co-partnership of Kemlein & Leahy to the corporation Kemlein & Leahy, Inc., through which corporation this plaintiff derives title, there is a cloud on the title of the plaintiff.

13. That prior to the commencement of this action, this plaintiff duly demanded of the defendants and each of them, that they join in and execute, acknowledge and deliver to this plaintiff a deed of conveyance of said property and the interest of Henry Kemlein therein to this plaintiff, but that said defendants refused to do so.

14. That this plaintiff makes no personal claim against the defendants or either of them.

WHEREFORE, plaintiff demands judgment:

1. That the defendants, and each of them, and every person or persons claiming under them or either of them, be forever barred from all claim to an estate in the property described in the complaint, and from all claim to any right or interest therein.

II. That the defendants and each of them and any and all persons claiming under them, be forever enjoined and restrained from asserting, setting up or claiming any right, title or interest in and to the said real estate or any part thereof or interest therein.

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III. That the defendants and each of them be required to execute, acknowledge and deliver to this plaintiff a good and sufficient deed of conveyance, transferring and conveying all their right, title and interest in the said premises or any part thereof.

IV. For such other and further relief in the premises as to the court may seem just, besides the costs of this action.

WILLIAMS, FOLSOM & STROUSE,
Attorneys for Plaintiff,
55 John Street,
Manhattan, New York City.

[*Verification.*]

THE TOWN OF IRONDEQUOIT, Respondent, v. SEPHARINE
COSTICH, Appellant ¹

(203 N. Y. 640; aff'g without opinion, 138 App. Div. 916; 123 Supp. 1144, no opinion)

Penalty; public health; action by municipal corporation for penalty in maintaining a nuisance contrary to regulation of local board of health

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered May 20, 1910, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover a penalty for violation of an ordinance of the board of health of the town of Irondequoit.

Frank J. Hone for appellant.

Herbert Leary and *W. H. Sullivan* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, CH. J., GRAY, HAIGHT, VANN,
WERNER, WILLARD BARTLETT and CHASE, JJ.

¹For complaint from this case see *post*, page 92. For charge of trial judge, see *post*, page 95.

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Form No. 7

Complaint; Penalty; Public Health; Action by Municipal Corporation for Penalty in Maintaining a Nuisance Contrary to Regulation of Local Board of Health ¹

Justice's Court, Town of Greece, Monroe County, N. Y.

The Town of Irondequoit, of the
County of Monroe, N. Y.,
against
Sepharine Costich.

The plaintiff, for its complaint against the defendant herein, alleges:

1. That the defendant is now and has been for more than five years last past an actual resident and inhabitant of the Town of Irondequoit, Monroe County, New York.

2. That the plaintiff is now and has been for more than twenty years last past a municipal corporation, duly organized and created as such under and by virtue of the laws of the State of New York, and is one of the towns within the County of Monroe, New York.

3. That said plaintiff is thickly populated and has now and had at all of the times hereinafter mentioned a population of about three thousand two hundred inhabitants.

4. That the plaintiff has now and had for more than five years last past a local board of health duly organized and created under and by virtue of the Laws of the State of New York.

¹ From *Town of Irondequoit v. Costich*, 203 N. Y. 640; aff'g without opinion, 138 App. Div. 916; 123 Supp. 1144, no opinion. See *ante*, page 91.

For Charge of Trial Judge, see *post*, page 95.

For complaint from *People v. Liberman Dairy Co.*, 195 N. Y. 609, which was an action for a penalty in selling impure milk contrary to the provisions of the Agricultural Law, §§ 20, 22 and 31, see BRADBURY'S RULES OF PLEADINGS, page 1149.

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5. That the said local board of health of this plaintiff on or about the 5th day of May, 1906, at the Town of Irondequoit, Monroe County, New York, and under and by virtue of the Statutes of the State of New York in such case made and provided duly enacted, made and published and posted in divers public places in said Town of Irondequoit and publicly distributed the same among the inhabitants of said town an order and regulation of which the following is a copy, viz:

Regulation 1. No human excrement, commonly called night soil, house refuse, offal, garbage, decaying vegetable matter, or organic waste substance of any kind, shall be brought into the town of Irondequoit, N. Y., or thrown, deposited, put or drawn upon or over any street, road, place, land or field, or put, kept, or stored in any vault, pit or other receptacle, therein or thereon, within said town of Irondequoit, except such night soil, house refuse, garbage, decaying vegetable matter or organic waste as shall be natural accumulation on the premises in said town of Irondequoit of the person or persons drawing the same; and such accumulations may be thrown or deposited upon the premises, land or field of the person where the same accumulated, provided the same shall be plowed under or otherwise buried within twenty-four hours from the time the same is deposited or thrown upon such land, field or premises. A violation of any of the provisions of this ordinance shall subject the offending party to a penalty of \$100, and the said local board of health deemed said rule and regulation necessary and proper for preservation of life and health, and the execution and enforcement of the public health law of the State of New York, in the said town of Irondequoit, Monroe County, New York, and that said rule and regulation is now and was at all of the times hereinafter mentioned since the making of the same by the said local board of health, in full force and effect in the said Town of Irondequoit, Monroe County, New York.

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6. That the defendant is now and was at all of the times hereinafter mentioned the owner in fee and in possession of a farm consisting of about twenty-five acres of land situate on the Woodman Road, a public highway in the said Town of Irondequoit, Monroe County, New York.

7. That on or about the 14th day of August, 1906, the said defendant with full knowledge of said rule and regulation of the local board of health of this plaintiff, did willfully, knowingly and contrary to the provisions of said rule and regulation, bring into the said Town of Irondequoit, substances detrimental to the public health and consisting of house refuse, offal, garbage, decaying vegetable matter and organic waste substances from the City of Rochester, New York, and did draw the same over divers roads and highways, in said town, and did throw, deposit and put the same upon the said land of said defendant in said town, and did also put some of said described articles hereinbefore mentioned and alleged in a pit upon the land of said defendant in said town, and did so expose the said prescribed substances and prohibited substances in such a manner in Town of Irondequoit as to be injurious and detrimental to the public health, and that said prescribed and alleged substances were not the natural accumulations on the premises of said defendant in the said town of Irondequoit, and that said defendant violated the provisions of the said rule, regulation and ordinance and did subject himself to the penalty of one hundred dollars as provided in the said rule and regulation, and whereby an action has accrued to the plaintiff as such town to demand and have of the said defendant one hundred dollars, being the penalty imposed by the said rule and regulation of the said local board of health of this plaintiff, and for which amount this plaintiff will demand judgment against said defendant.

WHEREFORE, this plaintiff demands judgment against said defendant for one hundred dollars with interest

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thereon from the 14th day of August, 1906, besides costs of this action.

HERBERT LEARY,
Plaintiff's Attorney,
No. 854 Powers Building,
Rochester, N. Y.

CHARGE ¹

J. B. M. STEPHENS, Monroe County Judge:

Gentlemen of the jury, I can present the matters that you will have to consider in this case in a very brief compass, I think.

The legislature has enacted a law which creates boards of health in the several towns of the State; it has conferred upon those boards of health the power to make such rules and regulations as they may deem necessary and proper for the preservation of life and health. So that the board of health of the town of Irondequoit had the right, under the authority vested in it by the legislature, to make such rules and regulations as it deemed necessary and proper for the preservation of life and health in the town of Irondequoit.

Ordinances, however, made by boards of health under this sanction of the legislature are subject to judicial review in the courts; they are necessarily penal and punitive and the test that is to be applied to them, when actions are brought upon them is, are they reasonable, uniform in their operation and unoppressive; if they stand this test of uniformity and unoppressiveness in their operation, they are valid and enforceable laws.

The argument has been made in your presence with reference to this ordinance that it is unreasonable in its application, and if it be in its essential and larger application unreasonable, it is not a valid ordinance. The mat-

¹ From *Town of Irondequoit v. Costich*, 203 N. Y. 640; aff'g without opinion, 138 App. Div. 916; 123 Supp. 1144, no opinion. See *ante*, page 91. For complaint from this case, see *ante*, page 92.

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ters that have been suggested in your hearing are that it prohibits even the carrying of a basket of shavings into the town of Irondequoit, or a pail of kitchen refuse from the dinner-table from the south side of Norton street to the north side of Norton street to feed to the chickens.

An ordinance is not to be tested by any extreme case that may be covered by it and this ordinance is not to be tested by the fact that it may, in its general language, forbid what seem to be trivial things and not harmful; it is to be tested by its general scope and purpose, and if it meets the test of reasonableness when it is operated to do things which it is obviously designed to do, it is a valid ordinance, although the general language employed may forbid the doing of slight things which, in themselves, would not be wrongful. You are to consider this ordinance in its general scope and purpose and application. The language is, so far as it is pertinent to this case, that no garbage, house refuse, offal, decaying vegetable matter or organic waste substance shall be brought into the town of Irondequoit, or thrown or deposited upon any land or place in that town, and it concludes with the statement that "a violation of any of the provisions of this ordinance shall subject the offending party to a penalty of one hundred dollars." Before you can find a verdict for the plaintiff in this case you must be satisfied by a fair preponderance of the evidence that the defendant has offended against the provisions of this ordinance by bringing into the town of Irondequoit any of these substances I have enumerated or by putting them upon any land or place in said town; if he has, either by his own direct effort or by any agency for which he was responsible, done any of these things, he has offended against the provisions of the ordinance; and if you are satisfied by a fair preponderance of the evidence that the material that was found upon his farm was decaying vegetable matter and detrimental to the health of the town of Irondequoit or of persons passing along the highway, and that it was

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placed there directly by himself or with his concurrence, then he has violated this ordinance and is subject to its penalty. If you are not satisfied by a fair preponderance of the evidence that the ordinance has been violated, or that the defendant has violated it, your judgment in the case should be for the defendant.

Mr. Hone: I except to your Honor's charge which says that if they are satisfied that the matter was detrimental to the public health the defendant has violated the ordinance.

I think your Honor has been misled by that complaint; those allegations were put in the complaint but are not allegations of a violation of the ordinance; the ordinance says nothing about anything being detrimental to the public health, etc.

The Court: I say to the jury that the town board of health has no authority to pass any ordinance for any other purpose except the preservation of life and health of the town, and if the things which the defendant carried into the town were not detrimental to health he has violated no law, because no law can be made that prevents a man taking things into the town of Irondequoit not detrimental to public health, by the board of health of the town.

Mr. Hone: I ask the Court to charge the jury that the only question here is whether the defendant has violated an ordinance.

The Court: I decline to vary my charge upon that subject.

Exception.

Mr. Hone: I ask the Court to charge the jury that the size of this pile of garbage or its condition is not material for their consideration.

The Court: That is declined.

Exception:

Mr. Hone: I ask your Honor to charge that the size of the pile and its condition is not to be considered.

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Declined. Exception.

Mr. Hone: I ask the Court to charge that a request to have a man do a thing does not make the man the agent or servant.

The Court: As an abstract proposition of law I charge that.

Mr. Hone: I ask the Court to charge the jury that mere permission to dump is not a violation of the ordinance.

Declined. Exception.

I also ask the Court to charge that Costich was under no obligation to go to the board of health and make an explanation to them. .

The Court: I charge it.

Mr. Hone: I ask your Honor to charge the jury that denial of ownership in the answer was not a false assertion but simply a form of pleading to put in issue the question of ownership to compel plaintiff to make proof, both complaint and answer being unverified.

The Court: I so charge, gentlemen.

The jury return to the court room after having retired and deliberated, and say they find for the plaintiff in the sum of one hundred dollars.

Mr. Hone: I move for a new trial upon the minutes, upon all the grounds stated in section 999 of the Code. Motion denied. Exception.

HERMAN VAN SLOCHEM, Respondent, *v.* HAROLD G. VILLARD, Appellant, Impleaded with Others ¹

(207 N. Y. 587; aff'g 154 App. Div. 161; 138 Supp. 852)

Pleading; complaint; demurrer; fraud; false representations inducing the purchase of stock

1. In an action for fraud by which the plaintiff was induced to purchase stock of a foreign corporation, a statement that the

¹ For complaint from this case see *post*, page 102.

For complaint for fraud in inducing exchange of Stock of Corpora-

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stock was non-assessable may present a mixed question of law and fact which can be determined only on the trial. If it should appear that it involved merely an expression of an opinion on the liability of the stock to assessment under the law of the foreign State, then its falsity would not support an action; but if it should appear that the stock was assessable because the defendants had not complied with a plain mandate of the statute requisite to give the stock immunity from assessment, then such an allegation would support the action. It seems that if the action was brought in relation to a domestic corporation the allegation of representations that the stock was non-assessable could be determined as a question of law in disregard of the allegations of the complaint.

2. An allegation that the defendants falsely represented the stock to be fully paid is sufficient to support an action of fraud as it relates to the cost and thus becomes material on the question of value.
3. In such an action an allegation that the defendants falsely represented the stock to be of great value is insufficient, since a false statement of the value of property made by the vendor for the purpose of obtaining a higher price will not sustain an action for fraud.

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 7, 1911, which affirmed an order of Special Term granting a motion for judgment in favor of plaintiff on the pleadings with leave to defendant, appellant, to withdraw his demurrer and serve an answer.

tion from *Seeley v. Osborne*, 195 N. Y. 536, see BRADBURY'S RULES OF PLEADING, page 1122.

For complaint for fraud and conspiracy in inducing owner of stock to sell the same by false representations as to the earning capacity of the stock from *Von Au v. Magenheimer*, 126 App. Div. 257; 110 Supp. 629; aff'd 196 N. Y. 510, see BRADBURY'S RULES OF PLEADING, page 1129.

For complaint in action against promoters of a corporation acting through a common agent for fraud, from *Downey v. Finucane*, 205 N. Y. 251, see 2 BRADBURY'S PL. & PR. REP. 389.

For complaint in action for rescission of sale of stock for fraud, from *Brown v. Byers*, 204 N. Y. 679, see 2 BRADBURY'S PL. & PR. REP. 536.

The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?"

Abram I. Elkus and *William M. Wherry, Jr.*, for appellant.

Henry L. Scheuerman and *Herbert R. Limburg* for respondent.

CULLEN, CH. J.:

The action was brought to recover damages for fraudulent representation of the defendant by which the plaintiff was induced to purchase stock of a corporation called the British Columbia Railway and Development Company, of which the defendants were the promoters. The representations charged in the complaint to have been made are that the stock was fully paid, non-assessable and of great value, each of which is charged to have been false and known so to be by the defendants, and to have been made with the intent to cheat and defraud the public or such persons as might purchase the stock. It is contended that the representations, even if fraudulently made, will not support an action for deceit. The claim is well founded as to the representation of value, for it has been decided by this court in *Ellis v. Andrews* (56 N. Y. 83) that a false statement of the value of property made by the vendor for the purpose of obtaining a higher price will not sustain an action for fraud.

The representation that the stock was non-assessable may present a mixed question of law and fact which can be determined only on the trial. If it should appear that it involved merely the expression of opinion on the liability of the stock to assessment under the law of Delaware, then its falsity would not support a cause of action; but if it should appear that the stock was assessable, and assessable because the defendants had not complied with a plain mandate of the statute requisite to give the stock

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immunity from assessment, then we think it would support the action. The allegations of the complaint in this respect we think are sufficient. It alleges the falsity of the representation and that the defendant knew it to be false. If the question were of liability under the laws of this State it would be one of law, and could be decided as such despite the allegations of the complaint. But foreign law is a matter of fact, and we cannot say that it is impossible that under the laws of Delaware the stock can be assessed.

As to the remaining allegation, that the stock was fully paid, it is the settled law of this State that the cost of a thing is a material allegation well adapted to affect the action or judgment of the purchaser, for a false statement of which an action will lie. (*Sandford v. Handy*, 23 Wend. 260; *Van Epps v. Harrison*, 5 Hill, 63; *Fairchild v. McMahon*, 139 N. Y. 290; *Townsend v. Felthousen*, 156 id. 618.) It is true that in the opinion of Chief Justice BRONSON in the *Van Epps* case he makes the statement that the price paid is immaterial, but, as stated by the learned judge, a majority of the court held to the contrary.

It is contended, however, that the representation "fully paid" is also a mere statement of opinion of what constitutes a full payment under the law of Delaware. We think that it is purely a statement of fact, and that it does not involve any question of law. If in Delaware these words have a different import or definition from that accorded them by the lexicographers, and the contract was made in that State, such matters should be pleaded and proved in defense of the action. In the absence of such proof, the representation should be construed to mean exactly what was said, that the stock was paid in full. The argument that the plaintiff could not have believed the representation because he bought the stock from the company itself for much less than par is a proper one to address to the jury, to whom the plaintiff's reliance on the representation must be submitted, but it cannot be

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considered as affecting or qualifying the allegation of the complaint that the plaintiff did rely on that representation. The company might have become the owner of the stock after its original issue for full value. Under the law of this State the company might have done so, provided the purchase of same was made from surplus profits. (Penal Law, Sec. 664.) What the law of Delaware on the subject is we do not know.

The order appealed from should be affirmed, with costs, and the question certified, which is, does the complaint state facts sufficient to constitute a cause of action, answered in the affirmative.

WERNER, WILLARD BARTLETT, HISCOCK, CHASE, COLLIN
and HOGAN, JJ., concur.

Order affirmed.

Form No. 8

Complaint; Fraud; False Representations Inducing the Purchase
of Stock ¹

Supreme Court, New York County.

Herman Van Slochem,	}
Plaintiff,	
against	
Harold G. Villard, William G.	
Conklin, James W. Howie,	
William C. Pratt, Sylvester D.	
Townsend, Edward Ashforth	
and Jean Wolkenstein,	}
Defendants.	

Plaintiff complains, on information and belief:

I. The British Columbia Railway & Development

¹ From *Van Slochem v. Villard*, 207 N. Y. 587; aff'g 154 App. Div. 161; 138 Supp. 852. See *ante*, page 98.

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Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware. It was incorporated in or about the month of August, 1909, with an authorized capital stock of Twelve million dollars (\$12,000,000.00), consisting of Four hundred and eighty thousand (480,000) shares of the par value of Twenty-five dollars (\$25) each.

II. The certificate of incorporation of said company was executed by the defendants, Villard, Howie, Townsend and Wolkenstein.

III. The first officers of the said British Columbia Railway & Development Company were defendant Villard, who was the president; defendant Conklin, who was the first vice-president; Joel C. Coffin, who was the second vice-president; defendant Howie, who was the treasurer, and defendant Pratt, who was the secretary.

IV. The defendants, other than Wolkenstein, together with Joel C. Coffin and James MacNaughtan, became and were the first board of directors of the said British Columbia Railway & Development Company, and took office as such directors on or about the 31st day of August, 1909. On or about the 3d day of December, 1909, the board of directors of the said corporation having been increased from eight to nine in number, the defendant Wolkenstein was elected and became the ninth director, and the said defendants were directors and constituted a majority of the board of directors of said corporation thereafter at the times hereinafter mentioned. The said Villard, Conklin, Coffin, Howie and Pratt constituted the officers of the said corporation and remained as such thereafter during the times hereinafter mentioned, except that the defendant Wolkenstein succeeded to the office previously held by said Coffin.

V. At the said time of organization of the said corporation as aforesaid, under the laws of the State of Delaware, and at all the times hereinafter mentioned, the Constitution of the State of Delaware contained the following

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provision, which was in full force and effect during all of said times, to wit:

"No corporation shall issue stock, except for money paid, labor done, or personal property or real estate, or leases thereof actually acquired by such corporation, and neither labor nor property shall be received in payment of stock at a greater price than the actual value at the time the said labor was done, or property delivered or title acquired."

VI. The said corporation began business with a One thousand dollar cash capital, which said One thousand dollars were paid for forty (40) shares of the capital stock of said corporation, issued at the par value of Twenty-five dollars (\$25) each, and the certificates of stock therefor were divided among the defendants Villard, Townsend, Howie and Wolkenstein.

VII. No other shares of the defendant corporation were at any time issued by the said corporation for cash, but all of the same, to wit, Four hundred seventy-nine thousand nine hundred and sixty (479,960) shares were thereafter issued by the said corporation, acting through the defendants, who comprised the majority of its directors and officers, for property or alleged property rights.

VIII. The defendants Wolkenstein and Villard were the active promoters of the said British Columbia Railway & Development Company; they formulated the plans for its organization; they selected its board of directors and officers, and originated the fraudulent plan and scheme hereinafter referred to.

IX. The defendants entered into a fraudulent conspiracy to rob the public, by selling to the public, by means of false and fraudulent representations, and for valuable considerations, stock of the British Columbia Railway & Development Company, and which they, the defendants, knew to be worthless; and to that end became directors and officers of said corporation. The defendants conspired and confederated to issue all of the capital

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stock of the defendant corporation, with the exception of the forty (40) shares paid for in cash, as aforesaid, to defendant Wolkenstein, in consideration of property or alleged property rights claimed to be owned by said Wolkenstein, which the defendants, and each of them, well knew were not worth the sum of \$11,999,000.00, being the par value of the stock so issued by the said corporation to Wolkenstein for such property or alleged property rights, but which the defendants, and each of them, knew to be worthless or substantially worthless. It was a part of said agreement, confederacy and conspiracy that said Wolkenstein should give to each of the other defendants, without payment of any actual consideration, Two thousand (2,000) shares of the capital stock of said corporation, and that the remainder, or a portion of the remainder of said stock, should be sold to the public for whatever prices might be obtainable therefor, as fully paid and non-assessable stock, whereas the defendants, and each of them well knew that said stock was not fully paid, and was not non-assessable. The laws of the State of Delaware at that time provided that where capital stock was not fully paid, the stockholders were liable and bound to pay the sums necessary to complete the amount of the par value of the stock, as fixed by the charter or certificate of incorporation, to the company, or such proportion as might be required to satisfy debts of the corporation, and the said stock of the defendant corporation, with the exception of the forty (40) shares issued for cash, was not fully paid and was assessable, under and by virtue of the Statutes and Constitution of the State of Delaware.

X. In furtherance of the aforesaid agreement, confederacy and conspiracy, the defendant, constituting the majority of the board of directors of the said British Columbia Railway & Development Company, passed resolutions directing the issuance of \$11,999,000.00, the par value of the capital stock of said corporation, to defendant Wolkenstein, in consideration of certain prop-

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erty or alleged property rights which the defendants knew to be worthless, or substantially worthless, and they adopted forms of stock certificates, reciting on the face thereof that said stock was fully paid and non-assessable.

XI. In furtherance of the said unlawful agreement, confederacy and conspiracy, and as part of the scheme for the issuance of said stock, the defendants arranged that a portion of the stock so issued to defendant Wolkenstein should be returned to the treasury of the said corporation, to the end that it might be sold as treasury stock, and that the said corporation might appear to be the seller thereof; and in furtherance of the said unlawful agreement, confederacy and conspiracy, the said defendants passed resolutions as directors of the said corporation, appointing and empowering defendant Wolkenstein, or such sub-agents as he might appoint, to sell the said treasury stock for the corporation to the public, for valuable considerations, as fully paid and non-assessable stock of said corporation; and in further furtherance of said unlawful agreement, confederacy and conspiracy, the defendants caused to be prepared, issued and promulgated among the public, false and fraudulent circulars, asserting that the said capital stock was fully paid and non-assessable, and of great value, all of which representations and statements said defendants and each of them knew to be wholly false.

XII. One of the objects of said unlawful conspiracy was by selling the said stock at high prices to the public, to create a fictitious market therefor, and to enable defendants and each of them to dispose of the Two thousand (2,000) shares of stock which they each acquired, without consideration, at high prices, thereby personally reaping a large benefit from said fraudulent acts.

XIII. Defendants being in control of the board of directors of said corporation, thereafter, during the month of April, 1910, acting through said Wolkenstein, sold or caused to be sold Eight thousand (8,000) shares of the said stock to one Michel Van Gelder for the sum of

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Eighty thousand dollars (\$80,000). In order to induce said Van Gelder to purchase the said shares, the defendants represented that the same had been fully paid and were non-assessable, and of great value, whereas in truth and in fact, as the defendants well knew, the said shares had not been fully paid, were assessable, and were worthless, and the said Michel Van Gelder, relying upon the said false and fraudulent representations, and believing them to be true, and induced thereby, did purchase the said shares (which were then worthless) for the said sum of Eighty thousand dollars (\$80,000), and paid therefor the said sum of Eighty thousand dollars (\$80,000) on April 15, 1910.

XIV. By reason of the matters aforesaid, the said Michel Van Gelder was damaged in the sum of Eighty thousand dollars (\$80,000).

XV. Plaintiff further alleges that after this cause of action had accrued, and prior to its commencement, said Van Gelder duly assigned and transferred to the plaintiff the claim, demand and cause of action hereinbefore set forth.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of Eighty thousand dollars (\$80,000), with interest from April 15, 1910, together with the costs and disbursements of this action.

HIRSCH, SCHEUERMAN & LIMBURG,
Attorneys for Plaintiff,
111 Broadway,
Borough of Manhattan,
New York City.

GEORGE C. VAN TUYL, JR., as Superintendent of Banks of the State of New York, Respondent, *v.* AUGUST C. SCHARMANN et al., Appellants, Impleaded with Others ¹

(208 N. Y. 53; aff'g 153 App. Div. 902; 137 Supp. 1147, no opinion)

Pleading; complaint; demurrer; banking; action by superintendent of banks to enforce liability of stockholders of insolvent trust company, for debts thereof under section 196 of the Banking Law

1. The Superintendent of Banks may institute an action against the stockholders of a trust company under section 196 of the Banking Law to enforce payment of debts and liabilities of such trust company without regard to section 59 of the Stock Corporation Law, even though the company has not been dissolved by a judgment of the court.
2. While the trust company may be a proper party to such an action, it is not a necessary party, and a demurrer to the complaint on the ground of a defect of parties defendant by reason of the omission of the trust company as such a party must be overruled.

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 1, 1912, which affirmed an order of Special Term overruling a demurrer to the complaint.

Two questions were certified by the Appellate Division:
First. Does the complaint herein state facts sufficient to constitute a cause of action?

¹ For complaint from this case see *post*, page 118.

For complaint in action by People to dissolve a bank, from *People v. Murray Hill Bank*, 10 App. Div. 328; 41 Supp. 804, see 2 BRADBURY'S FORMS OF PL. 1441.

Statement of the Case

Second. Is there a defect of parties defendant in that the Lafayette Trust Company is not made a party defendant here?

The action was brought by plaintiff as Superintendent of banks of the State of New York to enforce the liability of defendants, who were stockholders of the Lafayette Trust Company.

The complaint in substance alleged the following facts: That plaintiff was duly appointed superintendent of banks and qualified as such; the corporate existence of the Lafayette Trust Company under Article 5 of the Banking Law, and that said company was subject to the provisions of the Banking Law of the State of New York; that on or about November 30th, 1908, the debts and liabilities of the said company largely exceeded its assets and it was conducting business in an unsafe and unauthorized manner; its corporate stock has become and was impaired; that it had suspended payment of its obligations and was in an unsafe and unsound condition to transact business, and because of such condition the plaintiff superintendent of banks took possession and has since remained in possession of the property and business of the company, as provided by section 19 of the Banking Law, for the object and purposes therein mentioned.

The complaint further alleges that upon taking possession the plaintiff superintendent proceeded to collect the money due the company, to conserve its assets and business and to liquidate its affairs as provided by section 19 of the Banking Law; that apart from the sum of \$48,335.77 in cash there remain unconverted and uncollected assets of the company upon which not to exceed \$400,000 will be realized, while the total debts of the trust company owing to depositors and creditors amount to the sum of \$831,908.77, and the superintendent of banks has determined it is necessary to enforce the individual liability of stockholders of the said trust company to pay its debts and liabilities; that the capital stock of

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the trust company on November 30th, 1908, was \$500,000, consisting of 5,000 shares of the par value of \$100.00 each held by the defendants herein; that on March 21st, 1910, the superintendent of banks determined that in order to pay the liabilities of the trust company it was necessary to enforce the individual liability of the stockholders thereof, and thereupon made an assessment and requisition upon them for the sum of \$500,000 to be paid by them and each of them ratably on or before May 20th, 1910, in the proportion of \$100 upon each and every share of stock held by each of the stockholders on November 30th, 1908.

Other counts of the complaint made reference to the Banking Law and the duty of the plaintiff thereunder. Sufficient reference has been made to the complaint to present the nature of the cause of action therein set forth.

The relief demanded was judgment directing and decreeing that any remaining unconverted assets of the trust company be sold and disposed of as provided by law; that an accounting be had of all outstanding and existing assets and liabilities of the corporation; that the amount of deficiency necessary to pay in full the debts and liabilities as judicially determined by the court be apportioned among the stockholder defendants herein ratably according to the number of shares of said company's stock held by them respectively; that each defendant pay the portion thereof adjudged to be paid by him, and for such other relief as would seem just and equitable.

Defendants demurred to the complaint upon the grounds that it failed to state a cause of action, and further that there was a defect of parties in that the Lafayette Trust Company was not made a party defendant. The demurrer was overruled at Special Term, and the decision of that court unanimously affirmed by the Appellate Division. Permission was granted to appeal to this court, and the questions as above noted were certified.

Almet Reed Latson and Ward W. Pickard for appellants.

D. Cady Herrick and Frank M. Patterson for respondent.

HOGAN, J.:

Counsel for the appellants submits that the complaint fails to allege a cause of action for the reasons: (1) That the superintendent of banks as the representative of the corporation has no cause of action against the stockholders; (2) that section 19 of the Banking Law did not enlarge the liability of stockholders, but the only effect of its enactment was to transfer to the superintendent of banks such cause of action as the creditors themselves might have against the stockholders; (3) that the corporation still exists and that suits against it have not been restrained or rendered impossible; (4) that the creditors might, therefore, have performed the conditions precedent, prescribed by section 59 of the Stock Corporation Law, but, as the plaintiff does not allege that they, or any of them, have done so it fails to show that they have any cause of action against the stockholders, and, (5) the complaint fails to show that the superintendent of banks, as representative of the creditors, has any such cause of action, and the complaint, therefore, is insufficient upon its face.

We are called upon to determine whether the liability of stockholders of the Lafayette Trust Company for the debts of the company may be enforced by the superintendent of banks under the provisions of the Banking Law, or whether such liability is enforceable only after a compliance with the provisions of section 59 of the Stock Corporation Law (Consol. Laws, ch. 59), which is as follows:

"Section 59. Limitation of Stockholders' Liability. No action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part,

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and the amount due on such execution shall be the amount recoverable, with costs against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and no action shall be brought against a stockholder after he shall have ceased to be a stockholder, * * *."

The Stock Corporation Law enacted in 1890 (chapter 564) was a revision of the existing laws, particularly of the Manufacturing Corporations Law (Laws of 1848, chapter 40) and the Business Corporations Law (Laws of 1875, chapter 611). By section 57 a joint and several liability was imposed on stockholders of every stock corporation to creditors to an amount equal to the amount of stock held by them respectively for all debts and contracts made by the corporation "until the whole amount of capital stock shall have been paid in, * * *" and for debts due and owing to laborers, etc., substantially the liability imposed by the earlier laws referred to. Section 58 of the law was in effect the same as section 59 quoted. By section 1 of the Stock Corporation Law moneyed corporations were excepted from the provisions thereof.

The Stock Corporation Law was amended in 1892 (chapter 668) and provided that article one (which did not include the section under consideration) should not apply to moneyed corporations. On May 18th, 1892, the Stock Corporation Law (Laws of 1892, chapter 688) and the Banking Law (Laws of 1892, chapter 689) were approved by the governor.

Prior to the Banking Law of 1892 liability for debts of the corporation had not been imposed upon stockholders of banks, save in certain cases [2 R. S. (1st ed.) 589, section 16, later repealed Laws of 1830, chapter 71], and by the Constitution of 1846 (Article 8, section 7) upon stock-

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holders of banking corporations or associations "issuing bank notes or any kind of paper credits to circulate as money."

Section 52 of the Banking Law (L. 1892, ch. 689) provided:

"§ 52. Individual Liability of Stockholders. Except as prescribed in the Stock Corporation Law, the stockholders of every such corporation shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares. * * *"

In *Hirshfeld v. Bopp* (145 N. Y. 84) this court held that the language of the Banking Law "except as prescribed in the Stock Corporation Law" was to be construed as "subject to the limitations" of the Stock Corporation Law; that in an action by a creditor to charge a stockholder, under the Banking Law, it was incumbent on the plaintiff to aver and prove the performance of conditions precedent required by the Stock Corporation Law.

Section 52 of the Banking Law was amended (Laws of 1897, chapter 441) to provide a right of action to enforce the liability of a stockholder under that section by a receiver of a corporation dissolved by a judgment of the court, unless such officer should refuse to take such action, after which action in that behalf could be taken by a creditor, and, as so amended, is now section 71 of the Banking Law.

In 1887 the first general law to provide for the organization of trust companies, for their supervision and for the administration of their affairs (Laws of 1887, chapter 586) was enacted. By section 29 of the act, as amended by Laws of 1889 (chapter 558) stockholders thereof were made individually responsible, equally and ratably, for the then existing debts of the corporation to an amount equal to the par value of their respective shares of stock

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held by them in such corporation at the time of such default. That law was repealed by the Banking Law of 1892, and, in lieu thereof, article 4, entitled "Trust Companies," was included in the Banking Law.

Section 162 (which is now section 196) of the Banking Law read as follows:

"Liability of Stockholders and Directors. If default shall be made in the payment of any debt or liability contracted by any such corporation, the stockholders thereof shall be individually responsible, equally and ratably, for the then existing debts of the corporation, but no stockholder shall be liable for the debts of the corporation to an amount exceeding the par value of the respective shares of stock by him held in such corporation at the time of such default. * * *"

By section 17 of the Banking Law of 1892, provision was made authorizing the superintendent of banks to require a corporation subject thereto to make good any deficiency in the impairment of the capital stock, and in the event that the examination of any corporation disclosed that any bank was in an unsafe or unsound condition to do banking business, the superintendent was authorized to forthwith take possession of such bank, its property and business, and retain such possession until the termination of an action or proceeding instituted by the attorney-general. Likewise in the event that any such corporation violated its charter, or was conducting business in an unsafe or unauthorized manner, or it was unsafe for such corporation to continue business, the facts were to be reported to the attorney-general by the superintendent of banks, and the attorney-general was to institute such proceedings against the corporation as were authorized in the case of insolvent corporations. The form of the proceeding instituted by the attorney-general was an action for a dissolution of the franchises of the corporation, the appointment of a receiver and the liquidation of the affairs of the corporation.

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That form of procedure continued until the enactment of chapter 143, Laws of 1908, entitled "An act to amend the Banking Law, relative to impairment of capital, supervision, causes for dissolution and proceedings against and liquidation of delinquent corporations and individual bankers." That act amended section 18 of the Banking Law (now section 19, Consolidated Banking Law) so as to provide:

"Whenever it shall appear to the superintendent (of banks) that any corporation * * * to which this chapter is applicable * * * is conducting its business in an unsafe or unauthorized manner, or if the capital of any such corporation * * * is impaired, * * * or if any such corporation * * * shall suspend payment of its obligations, or if from any examination or report provided for by this chapter the superintendent (of banks) shall have reason to conclude that such corporation * * * is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue business he * * * may forthwith take possession of the property and business of such corporation * * * and retain such possession until such corporation * * * shall resume business, or its affairs be finally liquidated as herein provided. * * * Upon taking possession of the property and business of such corporation * * * the superintendent is authorized to collect moneys due to such corporation * * * and do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof as hereinafter provided. The superintendent shall collect all debts due and claims belonging to it, and upon the order of the Supreme Court may sell or compound all bad or doubtful debts, and on like order may sell all the real and personal property of such corporation * * * on such terms as the court shall direct; and may *if necessary to pay the debts of such corporation, enforce the individual liability of the stockholders.*"

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In *Matter of Union Bank of Brooklyn* (204 N. Y. 313, 316) Judge WERNER, construing the act of 1908, wrote: "The events which led to its enactment are familiar history of which we may take judicial notice. The financial depression of 1907, and the resulting embarrassment of many banks, culminated in a series of receiverships in which the demands for commissions and counsel fees were so extravagant as to arouse an instant popular demand for reform. To that end the superintendent of banks was by statute invested with the powers which had previously been exercised by receivers appointed by the courts. * * * The statutory enumeration of the superintendent's duties * * * indicates the legislative intent to transfer to the superintendent the general duties and functions which had theretofore been exercised by receivers."

The statute of 1908 expressly repealed all acts and parts of acts inconsistent therewith, and in unmistakable language conferred authority upon the superintendent of banks, if necessary to pay the debts and liabilities of a trust company, to institute action in his official capacity to enforce the liability imposed upon the stockholders thereof by section 196 of the Banking Law, unhampered by any limitations contained in the Stock Corporation Law or the fact that the charter of the company had not been dissolved by judgment of the court. The scheme of the statute was to provide a procedure for the liquidation of delinquent corporations through a department of the State for the benefit of creditors, which would be economic and speedy. The same general plan prevails in the liquidation of national banks by the comptroller of the currency, and the relief sought by the complaint in this action is similar to the relief which was theretofore obtained in proceedings authorized to be taken against stockholders of bank corporations to enforce the liability imposed upon them by article 8, section 7, Constitution of 1846 (Laws of 1849, chapter 226; Banking Law of 1882,

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chapter 409, article 6), and which was sustained by this court in *Matter of Empire City Bank* (18 N. Y. 199).

In the examination of the questions involved in this appeal we have not deemed it necessary to refer to the liability imposed upon stockholders by the Constitution of 1894 (article 8, section 7), neither have we overlooked the decisions of this court, called to our attention by the learned counsel for appellants. The cases upon which stress was laid by him were decided before the passage of the act of 1908.

In reference to the second count of the demurrer, that the Lafayette Trust Company is a necessary party to the action, we conclude that while the company may be a proper party defendant, it is not a necessary party. The views expressed lead to an affirmance of the decision of the Appellate Division.

The first question certified is answered in the affirmative, the second question in the negative.

The order should be affirmed, with costs.

CULLEN, CH. J., WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur; WERNER, J., concurs in result; COLLIN, J., dissents.

Order affirmed.

Complaint

Form No. 9

Complaint; Action by Superintendent of Banks under the Banking Law to Enforce the Statutory Liability of Stockholders of an Insolvent Trust Company for the Debts and Liabilities Thereof¹

New York Supreme Court, Kings County.

George C. Van Tuyl, Jr., as Superintendent of Banks of the State of New York, Plaintiff, against August C. Scharmann et al., Defendants.	}
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The plaintiff, by Frank M. Patterson, his attorney, complains of the defendants, and alleges:

FIRST: That the plaintiff is Superintendent of Banks of the State of New York, duly appointed and qualified as such.

SECOND: That at all the times hereinafter mentioned the Lafayette Trust Company was, and that it now is, a corporation organized and existing under, and by virtue of Article 5 of the Banking Law of the State of New York, and subject to all the provisions of the said Banking Law of the State of New York, having been first organized under the name and with the title of the Jenkins Trust Company, and its name having been changed to that of the Lafayette Trust Company, by virtue of an order of the Supreme Court, held in and for the County of Kings and State of New York, on or about May 12th, 1908.

THIRD: Upon information and belief, that heretofore the defendant, the Lafayette Trust Company, both under

¹ From *Van Tuyl v. Scharmann*, 208 N. Y. 53; aff'g 153 App. Div. 902; 137 Supp. 1147, no opinion. See *ante*, page 108.

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that name and under the name of the Jenkins Trust Company, had received deposits of money from various persons and corporations in large amounts, and became indebted and liable to them therefor, and had issued its corporate obligations for large sums of money, which it was and is, obligated to pay. That the debts and liabilities of the said company by reason thereof, heretofore and on or about the 30th day of November, 1908, largely exceeded its assets and it was conducting its business in an unsafe and unauthorized manner; that its corporate stock had become, and was impaired; that it had suspended payment of its obligations and was in an unsafe and unsound condition to transact the business for which it was organized, all of which became known to the then Superintendent of Banks, and because thereof, he on or about the 30th day of November, 1908, took possession of the property and business of the said Lafayette Trust Company and now remains in possession thereof, as provided for in Section 19 of the Banking Law of the State of New York, for the object and purposes mentioned in said Banking Law.

FOURTH: Upon information and belief, that the then Superintendent of Banks, upon taking possession of the property of said Trust Company, proceeded to collect the moneys due said corporation, and to do all the other acts necessary to conserve its assets and business, and proceeded to liquidate its affairs, as provided by Section 19 of the Banking Law of the State of New York, and this plaintiff has proceeded to make diligent efforts to reduce to cash all the assets of the Lafayette Trust Company. That apart from the sum of \$48,335.77 in cash now remaining in the hands of this plaintiff as such Superintendent, after paying the expenses of administration, there still remains unconverted and uncollected assets of such corporation, not exceeding in value over the sum of \$400,000 or \$500,000, which, however, when reduced to cash, deponent, upon information and belief al-

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leges will not realize to exceed \$400,000, if it does realize that sum.

FIFTH: Upon information and belief, the plaintiff further alleges, that the total debts and liabilities of the said Lafayette Trust Company owing to depositors and to creditors, due upon outstanding obligations of the said Trust Company, amount to the sum of \$831,908.77.

SIXTH: The plaintiff further alleges that the debts and liabilities of the said Lafayette Trust Company greatly exceed the property and assets of the said Trust Company, and that it is necessary to enforce the individual liability of the stockholders of the said Lafayette Trust Company to pay its debts and liabilities, and that the plaintiff, the Superintendent of Banks of the State of New York, has so determined.

SEVENTH: That on and prior to the said 30th day of November, 1908, the said Lafayette Trust Company had a capital stock of \$500,000, consisting of 5,000 shares of the par value of one hundred dollars (\$100) each, and that, except as hereinafter stated, on the 30th day of November, 1908, the defendants above named were, and still are, stockholders of the said capital stock to the amounts set forth opposite their respective names in the schedule hereunto attached, marked "Schedule A," and which is made a part of this complaint.

EIGHTH: That in and by said Article 5 of the Banking Law of the State of New York, and more particularly in and by Section 196 of said Article 5, it is provided that if default shall be made in the payment of any debt or liability contracted by any corporation organized under such Article 5, the stockholders thereof shall be individually responsible, equally and ratably, for the then existing debts of such corporation to the amount of the par value of the respective shares of stock held by such stockholders in such corporation at the time of such default.

NINTH: That, as by reference to said Section 19 of the Banking Law of the State of New York will more fully

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appear, it is provided that the Superintendent of Banks may, if necessary to pay the debts of such corporation, enforce the individual liability of the stockholders thereof.

TENTH: That on or about the 21st day of March, 1910, the then Superintendent of Banks determined that in order to pay the liabilities of the said Lafayette Trust Company, it was necessary to enforce the individual liability of the stockholders thereof, and thereupon made an assessment and requisition upon the said stockholders of the said Lafayette Trust Company, including the defendants above named, for the sum of \$500,000, to be paid by the said stockholders and each of them, ratably, on or before the 20th day of May, 1910, in the proportion of \$100 upon each and every share of the capital stock of said Lafayette Trust Company held or owned by each of the said stockholders respectively at the time of said default, to wit, the 30th day of November, 1908.

ELEVENTH: That none of the defendants have paid any portion of the assessments so made upon them, except the defendants Ada F. Brown, Douglas Conklin, Joseph Irwin, Theodore F. Jackson, Addison F. Samnis, Henry F. Samnis, William Woodhull Samnis, Martha L. Young and Thomas Young, and that no personal demand is made against them in this action, but they are made parties hereto so that upon an adjustment of the ratable portion to be paid by each of the defendants, if it should appear that they have paid more than the amount due from them, that the same may be equitably adjusted in the judgment to be had herein.

TWELFTH: Upon information and belief, that on or about the 12th day of March, 1908, John G. Jenkins died, a stockholder of said company and owning the shares of stock thereof set opposite his name in said Schedule A, and a resident of Seacliffe, in the County of Nassau, and State of New York, leaving a last Will whereby he appointed the defendants Edward T. Jenkins, John G. Jenkins, Jr., and Frank Jenkins, executors thereof; and

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that said Will was on the 16th day of April, 1908, duly proved and admitted to probate by the Surrogate of said County, who issued Letters Testamentary thereupon to said defendants, whereupon they duly qualified and entered upon the discharge of the duties of their said office.

THIRTEENTH: Upon information and belief, that on or about July 27, 1910, James W. Ridgway died a stockholder of said Company and owning the shares of stock thereof set opposite his name in said Schedule A, and a resident of the Borough of Brooklyn, City of New York, in the County of Kings and State of New York, leaving a last Will whereby he appointed the defendant Evelyn S. Ridgway executrix thereof; and that said Will was on the 13th day of September, 1910, duly proved and admitted to probate by the Surrogate of said last mentioned County, who issued Letters Testamentary thereupon to said defendant, whereupon she duly qualified and entered upon the discharge of the duties of her said office.

FOURTEENTH: Upon information and belief, that on or about the 21st day of September, 1905, John Rueger died a stockholder of said company and owning the shares of stock thereof set opposite his name in said Schedule A, and a resident of the Borough of Brooklyn, City of New York, in the County of Kings and State of New York, leaving a last Will whereby he appointed the defendants Emily Rueger and Frieda Rueger and his wife Emma Rueger executrices thereof; and that said Will was on the 17th day of October, 1905, duly proved and admitted to probate by the Surrogate of said last mentioned County, who issued Letters Testamentary thereupon to said defendants and said Emma Rueger, whereupon they duly qualified and entered upon the discharge of the duties of their said office.

Upon information and belief that said Emma Rueger died in May, 1911, and said defendants are now the sole surviving executors of said Will.

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FIFTEENTH: Upon information and belief, that on or about the 20th day of May, 1910, Kenneth Sutherland died intestate a stockholder of said company and owning the shares of stock thereof set opposite his name in said Schedule A, and a resident of the Borough of Brooklyn, City of New York, in the County of Kings and State of New York; and that on June 8, 1910, Letters of Administration upon his estate were duly issued and granted by the Surrogate of said last mentioned County, appointing the defendant Linna Sutherland administratrix of all the goods, chattels and credits which were of said deceased, whereupon she duly qualified and entered upon the duties of her said office.

SIXTEENTH: Upon information and belief, that on or about the 20th day of August, 1908, George H. Smith died a stockholder of said company and owning the shares of stock thereof set opposite his name in said Schedule A, and a resident of the Borough of Brooklyn, City of New York, in the County of Kings and State of New York, leaving a last Will whereby he appointed the defendant Tinie Smith executrix thereof, and that said Will was on the 10th day of September, 1908, duly proved and admitted to probate by the Surrogate of said last-mentioned County, who issued Letters Testamentary thereupon to said defendant, whereupon she duly qualified and entered upon the discharge of the duties of her said office.

SEVENTEENTH: Upon information and belief, that the defendant Frank and J. G. Jenkins, Jr., is a domestic corporation, duly created and existing under and by virtue of the laws of the State of New York.

WHEREFORE, the plaintiff demands judgment directing and decreeing that any remaining unconverted assets of said Lafayette Trust Company may be sold and disposed of as provided by law, that an accounting be had of all outstanding and existing assets and liabilities of said corporation, that the amount of deficiency necessary to pay in full said Company's debts and liabilities as judi-

Statement of the Case

cially ascertained by the Court be apportioned among the stockholder defendants herein ratably according to the number of shares of said company's capital stock held by them respectively; that each defendant pay the portion thereof adjudged to be paid by him, and that plaintiff have such other and further relief in the premises as to the Court may seem just and equitable, including the costs and disbursements of this action.

FRANK M. PATTERSON,
Attorney for Plaintiff,
27 William Street,
Borough of Manhattan,
New York City, N. Y.

[*Verification.*]

Attached to the complaint was an itemized schedule containing the names of all the stockholders of the corporation, the number of shares and the par value thereof held by each stockholder.

S. SHOPIRO COMPANY, Respondent, v. MARYLAND CASUALTY COMPANY, Appellant.¹

(207 N. Y. 702; aff'g without opinion 145 App. Div. 905;
129 Supp. 1147, no opinion)

Liability insurance; sprinkler leakage; construction of provision of policy excluding liability for damage from rupture of steam pipe

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 9, 1910, affirming a judgment in favor of

¹ For complaint from this case, see *post*, page 125.

For decision on motion to set aside verdict see *post*, page 128.

The Company defended the action on the strength of an exception in the policy reading as follows:

"This Policy does not cover loss or damage resulting from leakage occurring at any point outside of the inner surface of the cellar floor or

Complaint

plaintiff entered upon a verdict directed by the court in an action to recover upon a policy of insurance against loss or damage caused by leakage from an automatic sprinkler system.

Edward Schoeneck for appellant.

J. R. McGowan and *Benjamin Stolz* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., WERNER, WILLARD BARTLETT, CHASE, COLLIN and HOGAN, JJ. Not voting: HISCOCK, J.

Form No. 10**Complaint; Liability Insurance; Sprinkler Leakage ¹**

Supreme Court, Onondaga County.

S. Shopiro Company, against Maryland Casualty Company,	}
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The above-named plaintiff complaining of the defendant alleges that at all the times hereinafter mentioned the

walls; nor resulting from the explosion, rupture, collapse, or leakage of steam boilers or steam pipes. * * * "

The damage was caused by the rupture of a steam pipe which was an integral part of the sprinkler system. The defendant conceded this fact and also that the plaintiff could recover except for the provision of the paragraph from which the foregoing quotation is taken.

The plaintiff contended that the exception related to steam pipes other than those which were an integral part of the sprinkler system, or to a loss caused by a steam pipe coming in contact with or otherwise directly causing a leak resulting in water being discharged from the sprinkler system. Apparently this is the theory which was adopted by the court. See decision of the Trial Justice on a motion to set aside the verdict, *post*, page 128.

¹ From *S. Shopiro Co. v. Maryland Casualty Co.*, 207 N. Y. 702; aff'g without opinion 145 App. Div. 905; 129 Supp. 1147 (no opinion).

Complaint

plaintiff was and still is a domestic corporation organized and incorporated under and by virtue of the Laws of the State of New York; that the defendant above named at all the times hereinafter mentioned was and still is a foreign corporation organized and incorporated under and by virtue of the Laws of the State of Maryland.

Further complaining plaintiff alleges that at all the times hereinafter mentioned the plaintiff occupied the third and fourth floors of the building known as 225 and 227 Walton Street in the City of Syracuse, N. Y., and was there engaged in the manufacture of clothing; that at the times hereinafter mentioned the plaintiff was the owner of a stock of clothing, manufactured and in process of manufacture, and stock and materials for the same, and also shop and office furniture and fixtures, machines, machinery, patterns, safe, tools, implements and apparatus of every description used in connection with its business; that all of said property was located and contained in the said premises occupied by the plaintiff above set forth; that prior to the times hereinafter mentioned an automatic sprinkler system had been, and at the times hereinafter mentioned still was erected in the building occupied by the plaintiff; that as part of the said automatic sprinkler system erected in said building protection against the freezing thereof was provided by steam conducted through a steam pipe to the tank supplying the water for said sprinkler system.

That in and by its certain policy of insurance No. 40175 duly signed by the President and Secretary of the said defendant and countersigned by the general agent of the Company at Syracuse, N. Y., on the 17th day of December 1907, and delivered to the plaintiff, the defendant, in consideration of the sum of \$56.25 to it then paid by the plaintiff, did insure the plaintiff against loss or damage

See *ante*, page 124. For decision of trial judge on motion to set aside verdict see *post*, page 128.

Complaint

to the amount of \$5,000 to the property owned by the plaintiff above described situate on the premises occupied by the plaintiff and the defendant in and by said policy of insurance did promise and agree to indemnify and make good with said plaintiff all such loss or damage not exceeding the sum insured as aforesaid as should happen by the accidental discharge or leakage of water from the automatic sprinkler system then erected in or upon the building occupied by the insured during the term of such insurance beginning on the 11th day of December, 1907, and ending on the 11th day of December, 1908, and to be paid within ten days after notice, ascertainment, estimate and satisfactory proof of loss was received by the defendant.

That heretofore and on or about the 3d day of February, 1908, and while said contract of insurance was remaining in full force and effect there was an accidental discharge and leakage of water from the automatic sprinkler system erected in and upon said building and located on the fourth floor of the said building, 225 and 227 Walton street in the City of Syracuse, N. Y., occupied by the plaintiff herein and that thereby property consisting of clothing manufactured and in process of manufacture, and stock and materials for the same belonging to the plaintiff and contained on fourth floor of said building was destroyed and damaged; that the loss sustained thereby by the plaintiff was the sum of \$1,980.10.

That plaintiff has duly performed all the conditions on its part and more than ten days have elapsed since the delivery by the plaintiff to the defendant of due notice, ascertainment, estimate and satisfactory proof of loss and one year has not elapsed since said loss has occurred; that defendant denies that it is liable for any damage sustained by the plaintiff by reason of the leakage and discharge of water above mentioned.

Defendant has failed to pay the said sum of \$1,980.10 or any part thereof.

Opinion of Trial Judge

Wherefore plaintiff demands judgment against the defendant for the sum of \$1,980.10 and interest from the 3d day of March, 1908, besides costs.

McGOWAN & STOLZ,
Attorneys for Plaintiff,
339 Onondaga County Savings Bank Bldg.,
Syracuse, N. Y.

[*Verification.*]

DECISION OF TRIAL JUDGE ON MOTION TO SET ASIDE
VERDICT.¹

P. C. J. DE ANGELIS, J.:

Motion on the minutes by defendant to set aside verdict in favor of plaintiff directed by the court and for new trial.

The action was brought to recover damages to the plaintiff's stock of clothing manufactured and in process of manufacture and machinery, occasioned by leakage of water from a steam pipe, under a policy of insurance issued by the defendant to the plaintiff, to indemnify the plaintiff against direct loss or damage to such property by the accidental discharge or leakage of water from the automatic sprinkler system installed in the building occupied by the plaintiff.

The defendant defended claiming that by the terms of the policy it was expressly exempted from liability for leakage of steam pipes.

The defendant in its policy agreed to indemnify the plaintiff against direct loss or damage to the property in question by the accidental discharge or leakage of water from the automatic sprinkler system installed in the build-

¹ From *S. Shopiro Co. v. Maryland Casualty Co.*, 207 N. Y. 702; aff'g without opinion 145 App. Div. 905; 129 Supp. 1147 (no opinion). See *ante*, page 124. For complaint from this case see *ante*, page 125.

The foregoing opinion is not elsewhere reported.

Opinion of Trial Judge

ing occupied by the plaintiff, with some exceptions, of which the tenth is as follows:

"This Policy does not cover loss or damage resulting from any leakage occurring at any point outside of the inner surface of the cellar floor or walls; nor resulting from the explosion, rupture, collapse, or leakage of steam boilers or steam pipes; nor resulting from any interruption of business or stoppage of any work or plant; nor resulting from freezing; nor resulting from fire or violation of law; nor resulting from or caused by the wilful act of the Assured, nor by the neglect of the Assured to use all reasonable means to save and preserve the property insured hereunder; nor resulting from or caused by invasion, or insurrection, riot, civil war or commotion or military or usurped power, or by order of any civil authority; nor resulting from or caused by earthquake, cyclone, tornado, cloudburst, rain, wind, snow, hail, or thunder and lightning storms or tides or by blasting or explosions of any kind, or by the fall or collapse of any building or buildings, or part thereof; nor does this Policy cover any loss of or damage to accounts (except at their value as blanks), bills, currency, deeds, evidences of debt, money, notes or other securities, curiosities, drawings, paintings, jewels, manuscripts, medals or models; nor any loss or damage caused by any employé of the Assured under twelve years of age; nor for damage to the sprinkler plant itself."

The office of an automatic sprinkler system is the protection of buildings and their contents from fire. The system consists of a series of water pipes parallel to each other and about ten feet apart located at or near the ceilings of rooms or shops and extending the whole length or width of the rooms or shops. On the under side of the pipes are inserted devices about ten feet apart, which may be regarded as the sprinklers proper made with soft solder plugs which melt readily when subjected to heat. When a fire in a room or shop occurs and the heat reaches a certain temperature, say for example 135 degrees Fahrenheit, the solder plug melts and releases the water through the sprinkler and the sprinkler is so constructed that it

Opinion of Trial Judge

showers the water over a certain space. The intervals between the pipes and the intervals between the sprinklers on each pipe are so adjusted, when all operating, as to shower the whole room or shop like a heavy fall of rain. The water in these pipes may be supplied from a tank or from the hydrants of a water system.

It will be seen from the above that the *automatic* feature lies in the release of the water from the sprinkling pipes by the melting of the solder from the heat of the fire. The fire itself operates the agency for its own extinguishment.

The automatic sprinkler system installed in the plaintiff's clothing manufactory was supplied with water from a tank which in turn was supplied from the city water system. In order to prevent the freezing of the water in the tank and supply pipe carrying the water from the tank to the sprinkler pipes proper, in cold weather, the water in the tank and supply pipe was heated by steam. This steam was transmitted from a boiler in the basement of the building through a small steam pipe which passed into the supply pipe and through the supply pipe into the tank. The end of this pipe in the tank was open so that the pipe was filled with water from the tank except as the water was driven out when the steam was on. Proof was introduced by the plaintiff tending to show that there was no steam in such small steam pipe at the time of the leakage of the water resulting in the loss whose recovery is sought in this action. The leakage causing the alleged damage to the plaintiff was water that leaked from such steam pipe, due to its defective condition.

The claim of the plaintiff is that this steam pipe was part of the automatic sprinkler system and was covered by the insurance policy. The plaintiff asserts that the leakage of water against which the defendant stipulated not to indemnify the plaintiff was leakage that might be caused by certain steam pipes forming no part of the sprinkler system that were in close proximity to the sprinkler pipes proper, and not leakage from the steam pipe in

Opinion of Trial Judge

question. The precise loss or damage insured against was that caused "by the accidental discharge or leakage of water from the automatic sprinkler system."

As stated before, paragraph ten of the policy above quoted exempts the defendant from liability for certain losses or damages. It is fair to assume that the provision for exemption from liability was to relieve the defendant from liability which would otherwise exist under the general terms of the policy. An analysis of the exemptions will show that they come under three heads:

First. Damage or loss by water from any leakage occurring at any point outside of the inner surface of the cellar floor or walls. This seems to indicate that some part of the system, probably the tanks or supply pipes, may be outside the inner surface of the cellar floor or walls.

Second. Damage or loss from any leakage of water that proceeds directly from a first cause, as freezing, fire, earthquake, cyclone, the fall or collapse of any building.

Third. Damage or loss, consequential in its nature, following the wetting of the property insured by accidental leakage or discharge of water from the sprinkler system, like any interruption of the business or stoppage of any work or plant of the plaintiff or the neglect of the assured to use all reasonable means to save and preserve the property insured.

Early in paragraph ten occurs the language over which the parties contend. I will quote it again: "This Policy does not cover loss or damage resulting from any leakage occurring at any point outside of the inner surface of the cellar floor or walls; nor resulting from the explosion, rupture, collapse, or leakage of steam boilers, or steam pipes," etc. Leaving out unnecessary words the language is "This Policy does not cover loss or damage resulting * * * from the explosion, rupture, collapse, or leakage of steam boilers or steam pipes."

The plaintiff contends that the "boilers and steam

Opinion of Trial Judge

pipes" referred to are boilers and steam pipes in no manner connected with the sprinkler system and hence the defendant agreed to make good to the plaintiff the damage from the leakage of the steam pipe in question. The plaintiff insists that as there were other steam pipes in the room where the loss occurred, and might be others elsewhere, in no manner connected with the sprinkler system, the exemption applied to damage that might be caused by water from the sprinkler system caused to leak or be discharged by leakage of steam or hot water from these steam pipes outside of the system. The plaintiff insists that steam or hot water might issue from these pipes and come in contact with the solder plugs and release the water from the sprinklers.

The defendant, on the other hand, admitting that the steam pipe in question might be regarded as part of the sprinkler system, insists that it was a steam pipe; that the leakage of water from it caused the damage in question and that the stipulation above referred to was broad enough and designed to be broad enough to exempt it from liability for damage caused directly or indirectly by water from any part of the sprinkler system including the steam pipe in question. The defendant insists that the leakage referred to in this clause of the contract is leakage of either water or steam.

The plaintiff answers by saying that every other cause of damage mentioned in the language quoted is an independent cause that must have acted upon some portion of the sprinkler system and thereby caused the leakage of water and so the plaintiff insists that the "leakage" referred to in this clause might fairly be regarded as such a leakage of steam or hot water from a steam boiler or steam pipe as would by contact with some portion of the sprinkler system cause the water to leak or be discharged from that system, and that as the proof in the case shows that at the time of the damage suffered by the plaintiff this pipe simply held water and contained no steam, the

Statement of the Case

leakage from it was not the leakage described in the language of the policy which I have quoted. The policy having been prepared by the defendant and being subject to the rule that doubtful and ambiguous provisions must be construed most favorably to the assured, I have reached the conclusion that the plaintiff's contention is right.

The motion to set aside the verdict is denied.

HELEN M. PANCOAST, Respondent, v. THE TRAVELERS'
INSURANCE COMPANY, Appellant.¹

(207 N. Y. 699; aff'g without opinion 146 App. Div. 885; 130 Supp. 1123, no opinion)

Accident insurance; absence of visible marks on the body; death occurring more than ninety days after accident; delayed notice; claim by beneficiary named in policy

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department,

¹ For complaint from this case see *post*, page 135. For decision and findings see *post*, page 141.

For complaint on an accident policy in a case where the defense was that the plaintiff was following a different occupation from that stated in his application, from *Goodfellow v. United States Health & Accident Ins. Co.*, 195 N. Y. 522, see BRADBURY'S RULES OF PL., page 910.

For complaint on an accident policy where the premium was sent by mail and reached the company after the accident, from *Glover v. United States Health & Accident Ins. Co.*, 195 N. Y. 526, see BRADBURY'S RULES OF PL., page 912.

For complaint on accident policy when cause of death alleged to be septicæmia not stated to have been caused by an accidental injury, from *Schumacher v. Great Eastern Cas. & Ind. Co.*, 197 N. Y. 58, see BRADBURY'S RULES OF PL., page 915.

For complaint in action on accident policy, from *Zablitzky v. United*

Statement of the Case

entered August 7, 1911, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to recover upon policies of accident insurance.

Clinton B. Gibbs for appellant.

George A. Larkin for respondent.

Judgment affirmed, with costs, no opinion.

CONCUR: CULLEN, Ch. J., WERNER, WILLARD BARTLETT, HISCOCK, CHASE, COLLIN and HOGAN, JJ.

States Casualty Co., 1 BRADBURY'S PL. & PR. REP. 492, see page 494 of that volume.

The decision in the case in the text related to a point in accident insurance which has rarely been discussed by the courts. The policy in one section provided that death indemnity should be payable only in case the insured died within ninety days after an accident. It further provided, in another paragraph, that:

"In the event of death caused by sunstroke or freezing, or caused by bodily injuries of which there exists no external visible contusion or wound upon the body sufficient to cause death (accidental drowning only excepted) or in event of death or disability caused by hernia produced by external and accidental violence, the Company shall pay but one-half of the amount otherwise payable hereunder for bodily injuries covered hereby, anything to the contrary in this policy notwithstanding."

The plaintiff contended that the provision quoted above was entirely separate from the provision to the effect that payments of death penalties should be made only in case death resulted within ninety days from the date of the injury. The Trial Court sustained this contention.

There was also delayed notice and the Trial Court held that in a death case the representatives of the deceased were required to give only such notice as related to the death. See the Decision of the Trial Judge, *post*, page 141.

Complaint

Form No. 11

Complaint; Accident Insurance; Absence of Visible Marks on the Body; Death Occurring more than Ninety Days after Injury; Delayed Notice; Claim by Beneficiary Named in Policy¹

Supreme Court, Cattaraugus County.

Helen M. Pancoast, against The Travelers' Insurance Company.	}
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The above-named plaintiff by Hastings & Larkin, her attorneys, for an amended complaint and cause of action against the defendant herein, alleges:

1. That at all the times hereinafter mentioned the defendant above named was, and still is, a foreign insurance corporation organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in doing business in the State of New York, as an accident insurance company, being duly thereunto authorized by the provisions of the Statute of said State in such case made and provided. The head office of said company is at Hartford in the State of Connecticut.

2. That heretofore and on or about the 21st day of November, 1904, in consideration of the sum of \$25.00 to it in hand paid, the defendant above named issued its certain policy of insurance, in writing, No. C-41107, to Samuel W. Pancoast residing at Olean, Cattaraugus County, New York, wherein and whereby, for a good and valuable consideration to it in hand paid, it insured the said Samuel W. Pancoast against bodily injuries effected through external, violent and accidental means, in the sum of \$5,000, with five per cent increase annually, for

¹ From *Pancoast v. The Travelers' Insurance Co.*, 207 N. Y. 699; aff'g without opinion 146 App. Div. 885; 130 Supp. 1123 (no opinion). See *ante*, page 133. For decision see *post*, page 141.

Complaint

a period of ten years, to be paid to the said Helen M. Pancoast in case of death by accident under the provisions of said policy; said policy providing that in the event of death caused by sunstroke or freezing, or caused by bodily injuries of which there exists no external visible contusion or wound upon the body sufficient to cause death (accidental drowning only excepted), or in the event of death or disability caused by hernia produced by external and accidental violence, the company shall pay but one-half of the amount otherwise payable thereunder for bodily injuries received thereby.

3. That thereafter and on or prior to the 21st day of November, and in each of the years 1905, 1906, 1907 and 1908, and prior to the expiration of the said policy so issued as aforesaid, in consideration of the payment to it, the said defendant, of the further sum of \$25.00 in each of said years as aforesaid, said defendant, by an instrument in writing executed on its behalf and duly countersigned by a duly authorized representative of the company, for the said valuable consideration to it in hand paid, in terms, continued in force the said policy to the 21st day of November, 1909, subject to all the terms and conditions of the aforesaid policy; that the above-named plaintiff hereby refers to said original policy, and renewals and continuance thereof above set forth, for a more full, complete and accurate description of the terms and conditions thereof.

4. That heretofore and on the 27th day of June, 1909, the said Samuel W. Pancoast accidentally died at the City of Olean, in the County of Cattaraugus, State aforesaid, and that his death directly resulted from bodily injuries sustained wholly and exclusively through external, violent and accidental means, and that his death resulted from such injuries independently of all other causes, and said death was caused wholly by bodily injuries of which there existed no external, visible contusion or wound upon the body sufficient to cause death.

Complaint

5. That the cause of the illness and death of the said Samuel W. Pancoast, or the fact that his illness and death were due to an accident, or the fact that he had sustained any injury, for which claim could be made under the said policy, was not known or ascertained until after his said death, and until after an autopsy had been held and performed on his remains, on or about the 27th day of June, 1909; that immediately thereafter, or within two days thereafter, the agent of the defendant whose name appears on the aforesaid policy, was notified of the death of the said Pancoast, with full particulars of the said assured's death and of the said injury which he had sustained.

That, as plaintiff is informed and believes, said agent communicated the fact of the death of the said Pancoast, with full particulars of the cause of the assured's death and of the injuries which he had received, to the defendant and its officers, and that the defendant thereafter and pursuant to the said notice, investigated the facts and circumstances relating to the injury and death of the said Pancoast and the claims of the plaintiff under the said policy, and waived the provisions and conditions of the said policy requiring immediate written notice to be given; that within seven months after the date of the said accident the defendant disclaimed to this plaintiff any liability on account of or under the said policy of insurance and repudiated the plaintiff's claim thereunder, upon the ground that the policy was void, and thereby waived any and all provisions of the said policy requiring affirmative proofs of injury and death to be furnished to it by the plaintiff within seven months from the date of accident and injury resulting in death.

6. That the said insured duly complied, and the plaintiff herein has fully complied with and performed all the conditions of the said policy on his and her part to be performed under the conditions of the said policy, and although more than three months have elapsed since the

Complaint

furnishing to the defendant of affirmative proof of death of said Samuel W. Pancoast, the defendant has failed to pay the sum of \$3,000.00 or any part thereof, which, by the terms and conditions of said policy, became due and payable to this plaintiff before the commencement of this action, although payment of the same has been duly requested.

SECOND

For a second and further amended complaint and cause of action against the defendant herein, the plaintiff alleges:

1. That at all the times hereinafter mentioned the defendant above named was, and still is, a foreign insurance corporation, organized and existing under and by virtue of the laws of the State of Connecticut, and engaged in doing business in the State of New York, as an accident insurance company, being duly thereunto authorized by the provisions of the Statute of said State in such case made and provided. The head office of said company is at Hartford in the State of Connecticut.

2. That heretofore and on or about the 5th day of May, 1905, in consideration of the sum of \$25.00 to it in hand paid, the defendant above named issued its certain policy of insurance, in writing, No. C-41143, to Samuel W. Pancoast, residing at Olean, Cattaraugus County, New York, wherein and whereby, for a good and valuable consideration to it in hand paid, it insured the said Samuel W. Pancoast against bodily injuries effected through external, violent and accidental means, in the sum of \$5,000.00, with five per cent increase annually, for a period of ten years, to be paid to the said Helen M. Pancoast in case of death by accident under the provisions of said policy; said policy providing that in the event of death caused by sunstroke or freezing, or caused by bodily injuries of which there exists no external, visible contusion or wound upon the body sufficient to cause death (accidental drowning only excepted), or in the event

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of death or disability caused by hernia produced by external and accidental violence, the company shall pay but one-half of the amount otherwise payable thereunder for bodily injuries covered thereby.

3. That thereafter and on or prior to the 5th day of May in each of the years 1906, 1907, 1908 and 1909, and prior to the expiration of the said policy so issued as aforesaid, in consideration of the payment to it, the said defendant, of the further sum of \$25.00 in each of said years as aforesaid, said defendant, by an instrument in writing, executed on its behalf and duly countersigned by a duly authorized representative of the company, for the said valuable consideration to it in hand paid, in terms, continued in force the said policy of insurance to the 5th day of May, 1910, subject to all the terms and conditions of the aforesaid policy; that the above-named plaintiff hereby refers to said original policy, and renewals and continuance thereof above set forth, for a more full, complete and accurate description of the terms and conditions thereof.

4. That heretofore and on the 27th day of June, 1909, the said Samuel W. Pancoast accidentally died at the City of Olean, in the County of Cattaraugus, State aforesaid, and that his death directly resulted from bodily injuries sustained wholly and exclusively through external, violent and accidental means; and that his death resulted from such injuries independently of all other causes, and said death was caused wholly by bodily injuries of which there existed no external, visible contusion or wound upon the body sufficient to cause death.

5. That the cause of the illness and death of the said Samuel W. Pancoast, or the fact that his illness and death were due to an accident, or the fact that he had sustained any injury for which claim could be made under the said policy, was not known or ascertained until after his said death, and until after an autopsy had been held and performed on his remains, on or about the 27th day of

Complaint

June, 1909; that immediately thereafter, or within two days thereafter, the agent of the defendant, whose name appears on the aforesaid policy, was notified of the death of the said Pancoast, with full particulars of the said assured's death and of the said injury which he had sustained.

That, as plaintiff is informed and believes, said agent communicated the fact of the death of the said Pancoast, with full particulars of the cause of the assured's death and of the injuries which he had received, to the defendant and its officers, and that the defendant thereafter, and pursuant to the said notice, investigated the facts and circumstances relating to the injury and death of the said Pancoast and the claims of the plaintiff under the said policy, and waived the provisions and conditions of the said policy requiring immediate written notice to be given; that within seven months after the date of the said accident the defendant disclaimed to this plaintiff any liability on account of or under the said policy of insurance and repudiated the plaintiff's claim thereunder; upon the ground that the policy was void, and thereby waived any and all provisions of the said policy requiring affirmative proofs of injury and death to be furnished to it by the plaintiff within seven months from the date of accident and injury resulting in death.

6. That the said insured duly complied and the plaintiff herein has fully complied with and performed all the conditions of the said policy on his or her part to be performed under the conditions of the said policy, and although more than three months have elapsed since the furnishing to the defendant of affirmative proof of death of said Samuel W. Pancoast, the defendant has failed to pay the sum of \$2,875.00, or any part thereof, which, by the terms and conditions of said policy, became due and payable to this plaintiff before the commencement of this action, although payment of the same has been duly requested.

Decision and Findings

WHEREFORE, plaintiff demands judgment against the defendant for the sum of Five Thousand Eight Hundred and Seventy-five Dollars (\$5,875.00), with interest from February 7th, 1910, together with the costs of this action.

HASTINGS & LARKIN,
Plaintiff's Attorneys,
Olean, N. Y.

[Verification.]

Form No. 12

Decision and Findings; Accident Insurance; Death caused without Visible Marks on the Body more than Ninety Days after Injury; Delayed Notice; Claim by Beneficiary named in Policy ¹

Supreme Court, Cattaraugus County.

Helen M. Pancoast,
against
The Travelers' Insurance Company.

This case having regularly come on for trial before the Hon. Warren B. Hooker and a jury at a Special Term of this Court appointed to be held at the Court House in the village of Little Valley, N. Y., on the 28th day of September, 1910, and the parties having, pursuant to a stipulation made in open court, consented that the issues raised by the pleadings herein should be tried by me, and the said trial having been held before me, and arguments of counsel having been heard upon said issues, and the cause having been duly submitted to me for decision,

¹ From *Pancoast v. The Travelers' Insurance Co.*, 207 N. Y. 699; aff'g without opinion 146 App. Div. 885; 130 Supp. 1123 (no opinion). See *ante*, page 133. For complaint from this case, see *ante*, page 135.

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and due deliberation having been had, I decide and find as follows:

1. That the defendant is a foreign corporation duly organized, incorporated and existing by virtue of the laws of the State of Connecticut, authorized to and transacting a business in the State of New York as an accident insurance company.

2. That on the 21st day of November, 1904, the defendant executed and delivered to Samuel W. Pancoast, who was the husband of the plaintiff, its certain policy of insurance, in writing, No. C-41107, wherein and whereby, for a good and valuable consideration, it insured the said Samuel W. Pancoast against bodily injuries effected through external, violent and accidental means in the sum of Five Thousand Dollars, with five per cent increase annually for the period of ten years, the entire sum to be paid to the said Helen M. Pancoast in case of death by accident under the provisions of the said policy.

3. That on the 5th day of May, 1905, the defendant above named duly issued its certain policy of insurance, in writing, No. C-41143, to the said Samuel W. Pancoast, the husband of the plaintiff herein, wherein and whereby, for a good and valuable consideration to it paid, it did insure the said Samuel W. Pancoast against bodily injuries effected through external, violent and accidental means in the sum of Five Thousand Dollars, with five per cent increase annually for the period of ten years, to be paid to the said Helen M. Pancoast in case of death by accident under the provisions of the said policy.

4. That both of said policies of insurance contained the following provision:

"The Travelers' Insurance Company of Hartford, Connecticut, in consideration of the warranties hereinafter set forth, and of twenty-five (\$25.00) dollars, does hereby insure Samuel W. Pancoast of Olean, County of Cattaraugus, State of New York, under Classification Preferred (being a bottle manufacturer, supervisor only by occupation), for the term of twelve months

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from (in each policy from the date thereof), against bodily injuries effected through external, violent and accidental means as specified in the Schedule below.

"The principal sum of this policy in the first year is \$5,000.00.

"With 5% increase annually for ten years amounts to \$7,500.00.

"Each consecutive full year's renewal of this policy shall add 5 per cent. to the principal sum of the first year until such additions shall amount to 50 per cent. and thenceforth so long as this policy is maintained in force, the insurance shall be for the original sums plus the accumulations theretofore granted.

PART A. SCHEDULE OF INDEMNITIES

If any one of the following disabilities shall result from such In injuries alone within ninety days from the date of acci- ^{one} pay- ment, the Company will pay in lieu of any other indemnity ment
For Loss of Life.....The Principal sum.

In event of death the principal sum insured shall be paid to Helen M. Pancoast (the beneficiary), if surviving, otherwise to the executors, administrators or assigns of the Insured."

PART B. WEEKLY INDEMNITY

PART C. DOUBLE PAYMENTS

And on the second page of the policies in each case are the following provisions:

PART D. "SPECIAL PAYMENTS"

"In the event of death caused by sunstroke or freezing, or caused by bodily injuries of which there exists no external visible contusion or wound upon the body sufficient to cause death (accidental drowning only excepted), or in event of death or disability caused by hernia produced by external and accidental violence, the Company shall pay but one-half of the amount otherwise payable hereunder for bodily injuries covered hereby, anything to the contrary in this policy notwithstanding, or"

Then follow other parts and paragraphs of the policy.

5. That at the time of the death of the said Samuel W. Pancoast as hereinafter stated, both of said policies of

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insurance were in full force and effect according to their terms.

6. That on the 26th day of June, 1909, the said Samuel W. Pancoast died at the city of Olean, N. Y.

7. That on the afternoon of the 1st day of January, 1909, Samuel W. Pancoast was at the factory of the Olean Glass Company in the city of Olean, New York, of which company he was president, and while he was watching some repairs being made to a line shaft about eight feet from the floor, some object, either a piece of iron bolt, a chisel, hammer or some other tool, fell from the line shaft or its support and struck Pancoast on the left side of the head, crushing in a derby hat which he wore at the time; that the accident in no way disabled Pancoast at the time and he continued to do his work about the factory.

8. That at the time of the accident, and for some time prior thereto, said Samuel W. Pancoast had been in good health, but that on the night of the accident, January 1st, 1909, he began to complain of headaches and a general feeling of illness.

9. That from the night of January 1st, 1909, until the time of his death, June 26th, 1909, the said Samuel W. Pancoast was in constant ill health, complaining of headache and a general indisposition; that he made no complaint to his physician, Dr. J. E. K. Morris, nor to any member of his family, of having sustained any injury to his head; that this fact was not brought to the attention of his physician, nor to the members of his family, until the 20th day of June, 1909.

10. That the said Samuel W. Pancoast died as a result of pressure upon the brain due to a blood clot, and that said blood clot was caused by the accident which happened to him on the 1st day of January, 1909.

11. That until an autopsy was performed upon the body of the said Samuel W. Pancoast on the night of June 26th, 1909, no one, neither his physician, nor any member of

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his family, knew what was the cause of his death; that the said Samuel W. Pancoast never complained to his physician of having received any injury to his head on the 1st day of January, 1909, and never ascribed his illness to that cause.

12. That the death of the said Samuel W. Pancoast on the 26th day of June, 1909, was caused by bodily injuries effected through external, violent and accidental means on the 1st day of January, 1909, and was the direct result of injuries of which there existed no external visible contusion or wound upon the body sufficient to cause death.

13. That immediate notice was given to N. C. Jelliff, the agent of defendant, whose name appears upon each of the policies issued upon the life of the said Pancoast and to whom notice is directed to be given as provided in section 3 of Part F of each of the said policies, and that thereafter the said Travelers' Insurance Company, through its adjuster, one Richardson, and its agent, N. C. Jelliff, did investigate the cause of the death of the said Samuel W. Pancoast and the particulars of the said accident which he sustained.

14. That the said Richardson was an adjuster in the employ of the Travelers' Insurance Company, during the month of July, 1909; that N. C. Jelliff was in the employ of the Travelers' Insurance Company during the months of June and July, 1909, and was the agent whose name appears upon the two policies issued to Samuel W. Pancoast; that Conrad C. Klee was the manager of the Binghamton, New York, office of the Travelers' Insurance Company during the month of July, 1909, and is the person who countersigned the two policies issued to Samuel W. Pancoast.

15. That after notice had been given to N. C. Jelliff of the happening of the accident to Samuel W. Pancoast, and his death on June 26th, 1909, Conrad C. Klee, the manager of the Binghamton, New York, office of the

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Travelers' Insurance Company and the immediate superior of N. C. Jelliff, wrote a letter to Thomas H. Pancoast, the son of Helen M. Pancoast, and who was acting in his mother's behalf in attempting to collect upon the policies of insurance, in which the said Conrad C. Klee stated that N. C. Jelliff had informed him that Thomas H. Pancoast was desirous of obtaining proofs of loss, and that he (Conrad C. Klee) had notified the Buffalo, New York, office of the Travelers' Insurance Company, and that proofs of loss would be furnished and the matter looked after by that office. That subsequently the said Richardson and the said Jelliff came to Olean, interviewed Thomas H. Pancoast and his mother, Helen M. Pancoast, and obtained a signed statement from either Thomas H. Pancoast or his mother, Helen M. Pancoast, which statement contained the name, age, date of death of the said Samuel W. Pancoast and the particulars in regard to the accident which he sustained on January 1st, 1909; that at the same time the said Richardson and the said Jelliff stated to either Thomas H. Pancoast or his mother, Helen M. Pancoast, that they (Richardson and Jelliff) would obtain the statements of the witnesses to the accident and of the physician who attended Samuel W. Pancoast, and would forward the proofs of death to the company at Hartford, Connecticut; that after the investigation made by the said Richardson and Jelliff and the statement signed by either Thomas H. Pancoast or his mother, Helen M. Pancoast, and on the 13th day of July, 1909, the said Conrad C. Klee and the said N. C. Jelliff both stated to Thomas H. Pancoast that the Travelers' Insurance Company would not pay under the policies for the death of Mr. Pancoast, because there was no liability on its part under the policies for the reason that death did not result within ninety days from the date of accident.

16. That subsequently, and on the 3d day of January, 1910, the plaintiff did furnish to the defendant, at its home office at Hartford, Connecticut, affirmative proofs

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of the accident and injury resulting in the death of Samuel W. Pancoast, and that said affirmative proofs were furnished within seven months from the time of the death of the said Samuel W. Pancoast and within seven months from the time of the discovery by the said Helen M. Pancoast of the fact that Samuel W. Pancoast had received an injury on January 1st, 1909, which caused his death on June 26th, 1909.

17. That such sum as the plaintiff is entitled to receive under the two policies of insurance was due and payable on the 7th day of February, 1910.

And I do hereby make the further findings of fact at the request of the defendant herein, as follows:

18. That on the 26th day of June, 1909, one Samuel W. Pancoast, a resident of the city of Olean, County of Cattaraugus, and State of New York, died at his home in said city.

19. That at the time of his death, he had been ill the greater portion of the time between February 22d, 1909, and the date of his death.

20. That at the time of his death he was carrying two accidental policies with the defendant, as set forth and described in the complaint.

21. That during all of said time he was attended by one Dr. J. E. K. Morris, a physician of Olean, who was treating him for an infection of the gall bladder.

22. That on or about June 6th, or a few days thereafter, the deceased was stricken with paralysis in his right arm.

23. That after the paralysis occurred, the attending physician, Dr. Morris, changed his mind to some extent as to what the trouble was with the said Pancoast, and at the time of his death, the said physician did not know from what ailment he was suffering.

24. That on the 27th day of June, 1909, an autopsy was held on the body of the said Pancoast by Dr. Morris and Dr. Allen of the city of Olean, N. Y.

25. That at the time of the autopsy, so far as the

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physicians who made the same could discover, all the organs of the body were normal, and that the only difficulty found by the physicians was a thick blood clot on the left side of the head, about two inches long and one and one-half inches wide, through which ran small blood vessels, the same being a red spot upon or near the brain.

26. That said so-called blood clot was sufficient to and did produce the death of the said deceased as a result of the injury.

27. That on January 1st, 1909, at the Olean Glass Company's factory in said city, of which the plaintiff was president at that time, and in one of the buildings in said factory where workmen were repairing a bolt or pipe, a substance of some character flew from where the workmen were working or a missile of some kind dropped from the vicinity of where said workmen were pursuing their duties and struck the deceased upon the head or derby hat which he was wearing at said time in said room where said workmen were at work.

28. That upon the evening of the same day of said alleged accident, to wit: the 1st day of January, 1909, deceased called upon his physician, Dr. Morris, and complained to him of having a headache. That Dr. Morris treated him for catarrh and gave him some other medicine for headache.

29. That Dr. Morris did not see deceased again until the 31st day of January, 1909, at which time deceased again complained of said headache.

30. That Dr. Morris was again called to see deceased, who was confined to his bed, on the 22d day of February, 1909, and continued to treat him up to and until the time of his death; the treatment being for an infection of the gall bladder or what is commonly called gall stones.

31. That during all of said time the said Pancoast never said anything to his physician or any one else regarding the alleged accident at the factory, which it is claimed occurred on the 1st day of January, 1909.

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32. That the said Pancoast did not die within ninety days from the date of said alleged accident.

As Conclusions of Law I find:

1. That the death of Samuel W. Pancoast resulted from bodily injuries effected through external, violent and accidental means; that such injuries were sustained on the 1st day of January, 1909, and that he died of injuries of which there existed no external visible contusion or wound upon the body sufficient to cause death; that such injuries caused the death of said Samuel W. Pancoast on the 26th day of June, 1909.

2. That the limitation contained in Part A of each of the policies, requiring the death or disability to occur within ninety days from the date of accident, does not apply to the provisions of paragraph D.

3. That immediate notice was given to the Travelers' Insurance Company by the assured, Helen M. Pancoast, as soon as she discovered that the said Samuel W. Pancoast had sustained an injury for which claim could be made under the policies, and affirmative proofs of the accident and injury resulting in the death of Samuel W. Pancoast were furnished to the defendant within seven months from the happening of the said accident and injury resulting in death, as required by the provisions of section 3 of Part F of each of the policies.

4. That if the affirmative proofs of the accident and injury so furnished by the plaintiff herein to the defendant were not a compliance with the provisions of section 3 of Part F of each of the said policies, then the defendant has waived its right to insist upon a compliance with said provisions of the policy by repudiating liability thereunder on the 13th day of July, 1909.

5. That by virtue of the provisions of Part D of the said policies of insurance issued upon the life of Samuel W. Pancoast the beneficiary, Helen M. Pancoast, became entitled, after the death of the said Samuel W. Pancoast on June 26th, 1909, and her compliance with the provisions

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thereof, or the waiver of compliance by the defendant as above stated, to one-half of the amount payable under each of said policies in case of death resulting from an accident within ninety days of the happening thereof.

6. That the amount payable to the beneficiary under the terms of each of said policies is Three Thousand Dollars, which is one-half of the principal sum, with twenty per cent added for four year renewals of each policy.

7. That the plaintiff is entitled to recover from the defendant the sum of Six Thousand Dollars, with interest thereon from the 7th day of February, 1909, amounting in all to the date of this report, to the sum of Six Thousand, Three Hundred and Thirty-three Dollars.

And the plaintiff having moved to amend the complaint by changing the demand for damages from Five Thousand, Seven Hundred and Fifty Dollars to Six Thousand Dollars, I hereby grant said motion and direct that the demand for judgment in the complaint be amended to read "Six Thousand Dollars."

And I hereby order and direct that judgment be entered in the above-entitled action in favor of the plaintiff, Helen M. Pancoast, and against the defendant, The Travelers' Insurance Company, for the sum of Six Thousand, Three Hundred and Thirty-Three Dollars, together with the costs of this action, to be taxed.

Dated January 9th, 1911.

WARREN B. HOOKER,
Justice Supreme Court.

DOUGLAS SYMMERS, suing on his own behalf and others similarly situated, Respondent, v. HOWARD CARROLL et al., as Executors of JOHN H. STARIN, Deceased, Appellants¹

(207 N. Y. 632; aff'g 149 App. Div. 641; 134 Supp. 170)

Pleading; equity; carriers; insurance; carrier insuring merchandise for account of whom it may concern; action by owner of merchandise when loss has occurred and carrier has collected insurance

1. A common carrier by water, if he so desires, may insure the merchandise left in his charge not only for his own benefit but also for the benefit of the owners as well, and when he has insured such merchandise for "account of whom it may concern" and after a loss has received the proceeds of the policy, he holds the money as trustee for the owners of the merchandise and when, after a loss, the carrier has been relieved by decree of the Federal Courts from all liability to the owners of the cargo and has collected the whole amount of insurance the owners of the cargo may call the carrier to account, and after paying himself for his own loss, the carrier must divide what remains of the insurance money among the owners according to their respective rights and interests.
2. In such a case equity has jurisdiction in an action by some of the owners for the benefit of all to recover their proportionate interests. It is not necessary to allege in the complaint that there was any previous contract or arrangement between the carrier and the shipper that he should procure insurance on their account, or that they should pay any part of the insurance premium. Nor is it necessary to allege that the carrier's loss did not absolve the whole amount of the insurance money, as that fact, as well as the question of other insurance of individual shippers, are matters for inquiry on the accounting.

Appeal, by permission, from an order of the Appellate

For complaint from this case see *post*, page 157.

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Division of the Supreme Court in the First Judicial Department, entered March 15, 1912, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint.

Avery F. Cushman and James D. Dewell, Jr., for appellants.

Henry E. Mattison and James Emerson Carpenter for respondent.

CUDDEBACK, J.

This action is brought by the plaintiff in his own behalf and in behalf of all others similarly situated. Prior to December 16, 1904, John H. Starin, the defendants' testator, was the owner of a steamboat used by him in carrying merchandise and passengers from the city of New York in this State to the city of New Haven in the State of Connecticut. On the day mentioned the boat left New York bound for New Haven with a cargo of general merchandise, which included merchandise owned and shipped by the plaintiff's assignors, with the freight charges paid, or agreed to be paid thereon. While the steamboat was on Long Island Sound in the course of the voyage, it was burned to the water's edge, and the cargo was totally destroyed. By a decree of the United States District Court made under the Federal statutes, it has been adjudged that Starin was not liable for the loss or damage growing out of the destruction by fire of the merchandise on the vessel.

Before the voyage on which the fire occurred, Starin had procured from the Home Insurance Company a policy of insurance on the cargo which reads in part as follows:

"The Home Insurance Company, New York, by this policy of insurance * * * does insure John H. Starin as freighter, forwarder, bailee, common carrier or for account of whom it may concern, loss if any payable to

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him or order, to the amount of \$20,000, on goods, wares and merchandise," against loss by fire while on board the vessel so destroyed.

After the fire Starin collected the amount of the insurance, \$20,000, but refused to pay over to the plaintiff's assignors any part thereof, though he had paid a portion of the moneys received to the owners of other parts of the cargo lost. The complaint also alleges that the plaintiff has no knowledge as to the exact value of the merchandise destroyed by the fire, nor as to the identity of the owners, but that such owners are very numerous, and the action is brought for their benefit as well as for the benefit of the plaintiff. The demand for relief is that the defendants account for the insurance moneys collected by Starin and pay over to the plaintiff and the other persons entitled to share therein their proportionate parts thereof.

To the complaint setting forth these facts the defendants demurred upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court at Special Term and an interlocutory judgment to that effect was entered, with leave to the defendants to amend on the usual terms. The Appellate Division affirmed the interlocutory judgment and in affirming the same certified that a question of law had arisen in the case which in its opinion ought to be reviewed by the Court of Appeals. The question accordingly certified is, "Does the complaint state facts sufficient to constitute a cause of action?"

The argument of the defendants is that Starin had the right as common carrier to insure the cargo for his own benefit and that he had the right to collect *and retain* the amount of the loss irrespective of the question whether he was liable to the owners of the cargo for the damages which they had sustained. The plaintiff cites: *Phoenix Ins. Co. v. Erie & Western Transportation Co.*, 117 U. S. 312; *Baxter v. Hartford Fire Ins. Co.*, 12 Fed. Rep. 481;

Munich Assurance Co. v. Dodwell & Co, 128 Fed. Rep. 410.

These were all cases wherein the common carrier had been relieved by the shipper from liability for loss occasioned by fire. It was held that although relieved from such responsibility the carrier remained liable for his negligence and, therefore, his right to collect the insurance moneys was not to be determined after the loss by inquiry whether he was in fact liable to the owners of the cargo. He could insure himself against his own negligence and against the necessity of entering into any inquiry as to his negligence. Here the shippers did not release the carrier from liability for loss by fire and the cases cited do not apply.

It is also the law that a common carrier can if he so desires insure the goods left in his charge not only for his own benefit but for the benefit of the owners as well. (*Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606; *Hagan v. Scottish Ins. Co.*, 186 U. S. 423; *Pennefeather v. Baltimore Steam Packet Co.*, 58 Fed. Rep. 481; *Home Ins. Co. v. Minneapolis, St. Paul, etc., R. R. Co.*, 71 Minn. 296.)

In *Waring v. Indemnity Fire Ins. Co.* (*supra*) the policy of insurance covered oil owned by the plaintiff, "or held in trust on commission, or sold, but not removed, contained in bonded warehouse." It was held after loss that the plaintiff could recover for himself and for the benefit of a vendee for oil sold but not removed from the warehouse. Judge FOLGER said:

"It is laid down in broad terms that one may, in his own name, insure the property of another for the benefit of the owner without his previous authority or sanction, and that it will inure to the benefit of the owner upon a subsequent adoption of it, even after a loss has occurred" (p. 611).

In *Hagan v. Scottish Ins. Co.* (*supra*) the defendant insured the plaintiff Hagan, "for account of whom it may concern," against loss by fire on a tug, her hull, etc.

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The plaintiff subsequently sold a one-half interest in the tug to Martin. After a loss it was held that the plaintiff could recover on the policy. The court said:

"The words 'on account of whom it may concern' do not refer to those interested in the policy simply at the time it was taken out. The terms refer to the future. It is not a question of the persons concerned when it is taken out, but of those who may be concerned when the loss may occur, and who were within the contemplation of him who took out the insurance at the time he did so. It is on account of those who in the future, at the time of the happening of a loss, have the insurable interest and in regard to whom the policy will be applied. We think this the common sense interpretation of the language used and that it is justified and required by the authorities * * * " (p. 433).

When the carrier receives the proceeds of the policy of insurance, for account of whom it may concern, he holds the money as trustee for those concerned.

No particular words are necessary to create a trust. Trust relations will be implied when it appears that such was the intention of the parties and when the nature of the transaction is such as to justify or require it. (*Hoffman House v. Foote*, 172 N. Y. 348.)

A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of the provisions of the Code of Civil Procedure (§ 449). It was so held in *Duncan v. China Mutual Ins. Co.*, 129 N. Y. 237, which was an action on a policy of insurance issued by the defendant to the plaintiff on account of whom it may concern.

Starin in this case, having been relieved by the decree of the Federal courts from all liability to the owners of the cargo for their loss by fire, could not collect the amount of the loss on their property beyond the extent of his charges, except as trustee. It is held in *Home Ins. Co. v. Minneapolis, St. Paul, etc., R. R. Co.* (*supra*) that

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though a carrier has no pecuniary interest in the goods in his possession and is not liable for their loss by fire, he may insure them as "his own or held in trust by him," and in case of loss may recover in his own name, holding all in excess of his own claim in trust for the shipper.

If Starin held the insurance moneys as trustee then the owners of the cargo here represented by the plaintiff had the right to call him to account, and it was his duty to state his account and prove the items of his loss. (*Kliger v. Rosenfeld*, 120 App. Div. 396, 105 Supp. 214.) It was his further duty, after paying himself, to divide what remained of the insurance money among the owners of the cargo according to their respective rights and interest.

It is held in *Pennefeather v. Baltimore Steam Packet Co.* (*supra*) that where a carrier secures insurance on goods belonging to numerous owners for their benefit as well as his own, and the goods being destroyed, collects the entire amount of the insurance, equity has jurisdiction on the ground of avoiding a multiplicity of suits and the difficulty of making a proper apportionment, of a suit by some of the owners for the benefit of all who might join to recover their proportional interests therein.

Within the doctrine of the cases cited it was not necessary to allege in the complaint, as the defendant contends, that there was any previous contract or arrangement between the carrier and the shippers that he should procure insurance on their account or that they should pay any part of the insurance premium. It is sufficient if he intended to insure their interests in the cargo for their benefit and such intention is established by the words in the policy "for account of whom it may concern." Furthermore it was not necessary to allege that the carrier's loss did not absorb the whole amount of the insurance moneys, as the fact, whatever it may be, would be brought out on an accounting.

It does not appear from the complaint that any of the shippers had taken out insurance for their own benefit or

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that the policy issued to the carrier contained any provisions that would be applicable if there was other insurance on the cargo. If there was other insurance obtained by any individual shipper that might affect the amount of his recovery. These matters would also be a proper subject of inquiry on the accounting with all other facts touching the rights of any of the parties to share in the insurance moneys.

The question certified should be answered in the affirmative, and the order appealed from affirmed, with costs.

CULLEN, Ch. J., GRAY, WERNER, COLLIN and MILLER, JJ., concur; HISCOCK, J., absent.

Order affirmed.

Form No. 13

Complaint; Carriers; Insurance; Action by Shipper against Carrier to Recover Portion of Insurance (after loss) which the Carrier had Placed on Merchandise "For Account of Whom it may Concern"¹

Supreme Court, New York County.

Douglas Symmers, suing on his own behalf, and in behalf of all other persons similarly situated who may come in and contribute to the expenses of this action,

Plaintiff,

against

John H. Starin,

Defendant.

The plaintiff herein, suing in behalf of himself and of all others similarly situated who may come in and contribute

¹ From *Symmers v. Carroll*, 207 N. Y. 632; aff'g 149 App. Div. 641; 134 Supp. 170. See *ante*, page 151.

The original defendant, John H. Starin, died after the action was begun and Howard Carroll *et al.*, were substituted as executors.

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to the expenses of this action, presents this, his amended complaint, against John H. Starin, and complains and alleges as follows:

FIRST: Upon information and belief that at all the times hereinafter mentioned Moses Fox, Jacob L. Fox, Morris F. Marks and Moses Stern were co-partners in business in the town and county of Hartford, State of Connecticut, under the firm name and style of G. Fox & Company.

SECOND: Upon information and belief that at all the times hereinafter mentioned the Hoyt Beef & Produce Company was a corporation organized and existing under the laws of the State of Connecticut, and engaged in business in the town and county of New Haven, State of Connecticut.

THIRD: Upon information and belief that at all the times hereinafter mentioned the Edw. Malley Company was a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and doing business in the town and county of New Haven in said State.

FOURTH: Upon information and belief that prior to and on the 16th and 17th days of December, 1904, the defendant was the sole owner of the steamer "Glen Island," and used and employed said steamer in the carriage of merchandise and passengers between the Port of New York, State of New York, and the port of New Haven, State of Connecticut.

FIFTH: Upon information and belief that on or about the 16th day of December, 1904, the said steamer "Glen Island" left Pier 13, North River, in the port of New York, bound to the port of New Haven by way of Long Island Sound, having on board a cargo of general merchandise, part of which, to the value of \$1,139.75 was owned by and consigned to the said Hoyt Beef and Produce Company, and another part of which to the value of \$669.86 was owned by and consigned to the said Edw.

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Malley Company, and still another part of which to the value of \$1,832.45 was owned by and was consigned to said G. Fox & Company, all of which merchandise was in possession of and in process of transportation by the defendant at a rate of freight paid or agreed to be paid therefor from the port of New York to the port of New Haven, aforesaid, by way of Long Island Sound.

SIXTH: Upon information and belief that in the course of said transportation and on or about the 17th day of December, 1904, said steamer "Glen Island" while in Long Island Sound was burned to the water's edge and almost totally destroyed, and the merchandise laden on board said steamer, including the portion thereof belonging to the said Hoyt Beef & Produce Company, The Edw. Malley Company, and G. Fox & Company, as aforesaid, was entirely burned and destroyed.

SEVENTH: That the fire mentioned in the foregoing sixth paragraph of this amended complaint was not caused by the design or neglect of the defendant.

EIGHTH: That prior to the said voyage and fire the defendant herein had procured to be issued by the Home Insurance Company of New York, a corporation engaged in the business of fire and marine insurance, its certain policy of insurance whereby said The Home Insurance Company for value received did insure the said defendant "as freighter, forwarder, bailee, common carrier, or for account of whom it may concern," loss, if any, payable to said defendant or order in the sum of \$20,000 on goods, wares and merchandise, including live stock and baggage while on board the vessel known as the "John H. Starin," owned by the defendant, against all loss, damage detriment or hurt by fire, and any and all the other risks, perils and dangers incident to and consequent upon the use and navigation of the waters of Long Island Sound, among other waters named in said policy and that in and by the terms of the said policy of insurance defendant was "privileged to substitute other vessels of

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same class upon the approval in writing" of said insurance company.

NINTH: That the said policy of insurance referred to in the eighth paragraph of this amended complaint contained the following:

"The Home Insurance Company, New York, by this policy of insurance * * * does insure John H. Starin, as freighter, forwarder, bailee, common-carrier, or for account of whom it may concern; loss, if any, payable to him or order to the amount of \$20,000 on goods, wares and merchandise, including live stock and baggage while on board the following vessels: 'John H. Starin,' against all loss, damage detriment or hurt by fire, and any and all the other risks, perils and dangers incident to and consequent upon the use and navigation of the waters of the port, bays and harbors of New York, East and North or Hudson Rivers, inland waters of New York, New Jersey, Long Island Sound and all waters adjacent or tributary to any of the above waters. Privileged to substitute other vessels of same class upon the approval in writing of this insurance company. * * *

"It is the intent of these insurers to fully indemnify the assured for all general average, charges and salvage expenses, and loss, damage detriment or hurt to said property, but in no case shall this company be liable under this policy for a greater amount than the sums insured in this policy * * * loss limited to \$20,000 by any one vessel at any one time. * * * This insurance covers cargoes on and / or under deck."

TENTH: That thereafter and before the commencement of the voyage of said steamer "Glen Island" referred to in the fifth paragraph of this amended complaint said steamer "Glen Island" in accordance with the privilege granted defendant by the said policy of insurance was substituted in the place of the said vessel "John H. Starin," and said insurance was in full force and effect at the time of said fire and the burning of said merchandise, as aforesaid.

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ELEVENTH: That at the time of the procuring of said insurance by defendant, as aforesaid, it was the intention of said defendant to procure insurance not only as common carrier but as bailee of, and for the benefit of the owners of any and all goods that might thereafter, during the term of said policy, be in his possession on board said vessel "John H. Starin" or such other vessel as might from time to time in the running of said policy be substituted for said vessel "John H. Starin."

TWELFTH: Thereafter and or about the 18th of January, 1905, defendant herein instituted proceedings in the District Court of the United States for the Eastern District of New York for limitation of and exemption from liability as owner of said steamer "Glen Island," and for other relief, under and pursuant to the provisions of §§ 4282, 4283, 4284 and 4285 of the Revised Statutes of the United States and the statutes amendatory thereof and supplemental thereto, and such steps were thereafter taken in such proceedings that a final decree was thereafter, and on or about the 17th day of May, 1905, entered in the said proceedings in the said District Court of the United States for the Eastern District of New York, finally adjudging and decreeing that the said fire and the destruction of said merchandise was not due to any design, fault or neglect of the defendant herein, and that defendant was not liable for the loss, destruction, damage or injury growing out of the loss by fire of the said steamer "Glen Island" and her cargo, as aforesaid, all of which will more fully appear on inspection of said Final Decree, or an exemplified or agreed copy thereof to which reference on the trial hereof is prayed.

THIRTEENTH: Upon information and belief that after the said fire and burning of said merchandise the defendant collected from said insurance company the amount of said policy, to wit: the sum of \$20,000 for account of the owners of said cargo so burned as aforesaid.

FOURTEENTH: Upon information and belief defendant

Complaint

has paid out a portion of said insurance moneys so collected by him, as aforesaid, to other owners of merchandise destroyed by the said fire, situated the same as the said The Hoyt Beef & Produce Company, the Edw. Malley Co. and G. Fox & Co., but has refused to pay said last mentioned persons their pro rata share of said money collected by the defendant, as aforesaid, although payment thereof has been duly demanded.

FIFTEENTH: That before the commencement of this action the said persons above named, to wit: The Hoyt Beef & Produce Company, The Edw. Malley Company and G. Fox Company severally duly assigned their respective claims, as aforesaid to the plaintiff herein.

SIXTEENTH: Plaintiff has no knowledge nor any information sufficient to form a belief as to, and therefore is unable to state the exact value of the merchandise destroyed by the fire aforesaid, nor has plaintiff any knowledge or any information sufficient to form a belief as to the identity of the other owners of goods and merchandise laden on board said steamer "Glen Island," as aforesaid, and destroyed by said fire, but upon information and belief alleges that they are very numerous.

WHEREFORE plaintiff prays that defendant may be directed to account for and pay over to the plaintiff, and to the other persons entitled to share therein, their respective and proportionate shares of said insurance money collected, as aforesaid, with interest and costs, and that plaintiff may have such other and further relief as may be just.

CARPENTER, PARK & SYMMERS,
Attorneys for Plaintiff,
79 Wall Street,
New York City.

[Verification.]

**MAURICE DEICHES, Plaintiff, v. LAFRANCE COPPER
COMPANY, Defendant.** ¹

(Supreme Court, N. Y. Special Term, Part I, March 25, 1912)

Pleading; complaint; demurrer; corporations; action for sequestration against domestic corporation by receiver of foreign corporation under § 100 of the General Corporation Law :

1. In a suit under § 100 of the General Corporation Law, for the sequestration of the property of a domestic corporation, in an action by a receiver of a foreign corporation, it is not necessary to allege in the complaint that the defendant has, or ever had, any property within the State of New York, where it appears on the face of the complaint that a final judgment for a sum of money has been rendered against the defendant corporation and that execution was issued to the sheriff of the county where the corporation transacts its general business and has been returned unsatisfied.

Demurrer to complaint.

Overruled.

Lexow, Mackellar & Wells for the plaintiff.

Stanchfield & Levy for the defendant.

PLATZEK, J.:

The essential averments constituting a cause of action are sufficiently set out in the complaint demurred to. The relief demanded in the complaint is that the property of the defendant, a domestic corporation, be sequestered.

¹ For complaint from this case see *post*, page 164.

The suit was subsequently tried before Mr. Justice GERARD at Special Term, Part 3, New York County, and resulted in a judgment in favor of the plaintiff.

² Section 100 of the General Corporation Law does not apply to foreign corporations. *Matter of Meyer v. Consolidated Ice Co.*, 132 App. Div. 265; 116 Supp. 906; *aff'd* 196 N. Y. 471; *Dreyfus & Co. v. Seale & Co.*, 37 App. Div. 351; 55 Supp. 1111.

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It appears on the face of the complaint that a final judgment for a sum of money has been rendered against the defendant corporation and that execution was issued to the county where the corporation transacts its general business and has been returned unsatisfied. It is urged in favor of the demurrer that the omission to allege in the complaint that the defendant corporation has or ever had property within the State of New York is fatal to the cause of action attempted to be pleaded. From a reading of the statute upon which this action is predicated it is apparent that the omitted allegation is not fatal. This is a statutory action based on §100 of the General Corporation Law, and the complaint demurred to states all the essential facts required by said section of the statute. The demurrer is overruled and plaintiff's motion granted, with costs, with leave to defendant to withdraw the demurrer and plead over on payment of costs.

Form No. 14

Complaint; Sequestration against Domestic Corporation by Receiver of Foreign Corporation under § 100 of the General Corporation Law ¹

Supreme Court, New York County.

Maurice Deiches, Ancillary Receiver of the Ætna Indemnity Company of Hartford, Connecticut,

Plaintiff,

against

LaFrance Copper Company,
Defendant.

The plaintiff, by Lexow, Mackellar & Wells, his attorneys, complains of the defendant and alleges:

¹ From *Deiches v. LaFrance Copper Co.*, see *ante*, page 163.

Complaint

FIRST: That heretofore and on or about the 9th day of January, 1911, in an action brought by Charles I. Brooks against The Ætna Indemnity Company in the Supreme Court of the State of New York, in New York County, the above-named plaintiff was duly appointed Ancillary Receiver of the above-named, The Ætna Indemnity Company, by an order of this Court, dated January 9, 1911, and duly entered in the office of the Clerk of the County of New York on the same day.

SECOND: That plaintiff duly qualified as Receiver, and in compliance with the terms of said order, on the 9th day of January, 1911, executed and acknowledged in the usual form and filed with the Clerk of the County of New York, a bond to the People of the State of New York, in the penal sum of Fifty thousand Dollars (\$50,000) with sufficient sureties as required by law conditioned upon the faithful discharge of plaintiff's duties as such Receiver and upon plaintiff's duly accounting for all the moneys and property of every kind received by him as such receiver which said bond was approved on January 9, 1911, by the Hon. Alfred R. Page, one of the Justices of the Supreme Court of the State of New York.

THIRD: That at a Special Term of the Supreme Court for the County of New York, on January 9, 1911, an order was duly entered in the aforesaid action, brought by Charles I. Brooks against The Ætna Indemnity Company, whereby plaintiff was given full power and authority to demand, sue for, collect, receive and take into his possession, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, bills, choses in action, notes, and property of every description belonging to The Ætna Indemnity Company in the State of New York.

FOURTH: That The Ætna Indemnity Company is a foreign corporation duly created and existing under and by virtue of the laws of the State of Connecticut and duly licensed under the laws of the State of New York to carry

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on business in this State, and having its principal office for the transaction of such business, at No. 68 William Street, in the Borough of Manhattan, City, County and State of New York.

FIFTH: That the defendant, the LaFrance Copper Company, is and for more than three years before the recovery of the judgment herein mentioned, was a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York, and its general business is transacted and its principal office is and was at the time of the commencement of this action located at New York City, in the County of New York.

SIXTH: That on and prior to January 20, 1909, the defendant was indebted to The Ætna Indemnity Company in the sum of Nine Thousand Seven Hundred and Fifty Dollars (\$9,750) with interest thereon from July 1, 1908, for unpaid negotiable coupons made by the defendant in connection with certain of its negotiable bonds, of which The Ætna Indemnity Company was a lawful owner and holder, and which the defendant refused to pay, though the same was due.

SEVENTH: That thereafter The Ætna Indemnity Company commenced an action against the defendant to collect the amounts due on said coupons, together with the interest thereon, and on the 1st day of July, 1910, The Ætna Indemnity Company duly recovered a judgment against the said defendant in the Supreme Court, New York County, for the sum of \$11,116.08, which judgment was duly filed and docketed in the office of the Clerk of the County of New York, on the 1st day of July, 1910.

EIGHTH: That execution on said judgment against said defendant was duly issued to the Sheriff of the County of New York where defendant transacts its general business and has its principal office as aforesaid, on the 5th day of July, 1910, and that said execution has been returned wholly unsatisfied.

Statement of the Case

NINTH: That said judgment and the claim therefor remain wholly unpaid.

WHEREFORE plaintiff demands judgment:

1. That the property of the said defendant corporation be sequestered.

2. That the property of the defendant and the proceeds thereof be justly and fairly distributed among the fair and honest creditors of the defendant, including the plaintiff, in the order and in the proportions prescribed by law in case of the voluntary dissolution of a corporation.

3. That a receiver of the property and effects of the said defendant corporation may be appointed pursuant to law, with the usual powers and authority conferred upon receivers in such cases.

4. That the plaintiff have such other and further relief in the premises as may be just.

LEXOW, MACKELLAR & WELLS,
Attorneys for Plaintiffs,
43 Cedar Street,
Borough of Manhattan,
New York City.

[Verification.]

PAUL R. G. HORST, Respondent, v. FIDELITY WAREHOUSE
COMPANY, Appellant.¹

(207 N. Y. 712, aff'g without opinion 142 App. Div. 937; 127 Supp.
1125, no opinion)

**Warehouseman; damages caused by rats to hops stored with de-
fendant as warehouseman**

Appeal from a judgment of the Appellate Division of
the Supreme Court in the First Judicial Department,

¹ For complaint from this case see *post*, page 168. For charge of
trial judge, see *post*, page 169.

For complaint in action against warehouseman for damage to furs on

Complaint

entered February 3, 1911, affirming a judgment in favor of plaintiff entered upon a verdict.

Charles Harris Luscomb for appellant.

George A. Strong for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, WERNER, HISCOCK, COLLIN, CUDDEBACK and MILLER, JJ.

Form No. 15

Complaint; Warehouseman; Damages Caused by Rats to Hops
Stored with Defendant as Warehouseman ¹

Supreme Court, New York County.

Paul R. G. Horst, Plaintiff, against Fidelity Warehouse Company, Defendant.	}	
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Plaintiff by this complaint alleges:

FIRST: The plaintiff is a resident of the City and State of New York. Defendant is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

storage, from *Herzig v. New York Cold Storage Co.*, 115 App. Div. 40; 100 Supp. 603, see 2 BRADBURY'S FORMS OF PL. 1211.

For complaint in action against warehouseman for failure to maintain temperature sufficient to preserve eggs, from *Sutherland v. Albany Cold Storage & Warehouse Co.*, 171 N. Y. 269, see 2 BRADBURY'S FORMS OF PL. 1212.

¹ From *Horst v. Fidelity Warehouse Co.*, 207 N. Y. 712; aff'g without opinion 142 App. Div. 937; 127 Supp. 1125, no opinion. See *ante*, page 167; for charge of trial judge, see *post*, page 169.

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SECOND: On or about the 1st day of November, 1907, plaintiff made a contract with the defendant for the storage of hops belonging to plaintiff in defendant's warehouse in the City of New York, in and by which it was agreed that the defendant should exercise all proper and reasonable care in and about the safe storage of said hops.

THIRD: Thereafter the plaintiff delivered a large quantity, to wit, between thirteen and fourteen hundred bales of hops, to the defendant, under and pursuant to the contract aforesaid, but the defendant failed and neglected to use proper and reasonable care in and about the safe storage of same, and thereby allowed the hops to be greatly injured by rats and mice, to the plaintiff's damage in at least the sum of Two thousand (\$2,000.00) dollars, which said amount, although duly demanded of the defendant, it has neglected and refused to pay, or any part thereof.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Two thousand dollars, with interest from the 1st day of November, One thousand nine hundred and seven.

DUER, STRONG & WHITEHEAD,
Attorneys for Plaintiff,
No. 43 Wall Street,
Borough of Manhattan,
New York City.

[Verification.]

CHARGE ¹

HENDRICK, J.:

Gentlemen of the Jury: This action is brought by the plaintiff, Paul R. G. Horst, against the defendant Fidelity Warehouse Company, to recover damages which he claims

¹ From *Horst v. Fidelity Warehouse Co.*, 207 N. Y. 712; aff'g without opinion 142 App. Div. 937; 127 Supp. 1125, no opinion. See *ante*, page 167; for complaint from this case, see *ante*, page 168.

Charge

the defendant, and I correct any other expression in my charge which may be at variance with that view.

Mr. Stearns: I have the following requests to charge, your Honor:

The defendant is a warehouse man and as such was in law bound to exercise the same care in protecting plaintiff's property from injury that a reasonable man——

The Court: I have so charged them. Point out anything I have not charged.

Mr. Stearns: The reasonable care which the defendant by its contract with the plaintiff agreed to use in protecting his hops from injury, might involve a greater or lesser degree of diligence on defendant's part according to circumstances. If the mice or rats were numerous, reasonable care would call for greater diligence in devising ways and means for their extermination.

The Court: That is another way of putting what I have already said, but I will charge it in those words.

Mr. Stearns: If the jury is satisfied—No. 5—upon the evidence——

The Court: Is this something I have not charged?

Mr. Stearns: I don't think you have charged it. I merely wanted to get this in.

The Court: I will charge that. It is another form of saying what I have already said.

"If the jury is satisfied upon the evidence that defendant's employes in charge of its warehouse had occasion from time to time to see the great damage that was being done to plaintiff's hops by rats and mice"—that is objectionable, because it assumes that there was great damage done. I will modify that by saying: "Defendant's employes in charge of its warehouse had occasion from time to time to see that great damage was being done to plaintiff's hops by rats and mice, and seeing this damage, if there were any, took no further measures to protect the hops—I insert the word 'If there were any'—than it would have taken if no appreciable damage had occurred, they

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may then find that this constituted a breach of defendant's contract to exercise reasonable care with respect to plaintiff's hops."

Yes, if those were the facts I will so charge.

Mr. Luscomb: I except.

Mr. Stearns: Will you charge No. 6?

The Court: I think I will leave that to the jury, whether or not a reasonable man should have inspected those goods from time to time.

Mr. Stearns: Could I have that copied on the record and except to it?

The Court: Yes. I am requested to charge that your defendant should have inspected those hops from time to time and should know the condition of the same, and whether or not they were being damaged. I don't think that is the law. I refuse to charge that except as I have charged.

Mr. Stearns: I except.

I ask your Honor to charge No. 7. Defendant was bound to notify plaintiff of any material damage to his hops within a reasonable time.

The Court: I charge that.

Mr. Stearns: You charge the jury that that is the fact,—that the defendant was bound to notify plaintiff of any material damage to his hops within a reasonable time?

The Court: Yes.

Mr. Luscomb: That is excepted to.

Has your Honor ruled upon my requests?

The Court: I think I have charged everything. What ones do you think I have not charged?

Mr. Luscomb: No. 3, if your Honor please.

The Court: I will decline that except as I have charged.

Mr. Luscomb: I except.

Does your Honor charge the fifth, as requested?

The Court: I think I have charged that, Mr. Luscomb, very fully.

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he suffered to hops which were stored by him with the defendant. It appears that on the 12th of November, 1907, the plaintiff stored 2,537 bales of hops with the defendant. The plaintiff claims that of that number 239 bales were badly damaged, and that sixty bales were partially damaged by reason of the defendant's negligence in relation to the storage of the bales.

You must take this case as reasonable men, and apply to it the rules of law which the Court gives you for your guidance in findings the facts. We are engaged, gentlemen, after the efforts of counsel in behalf of their respective clients—you and I—as the Supreme Court of this State, for the purpose of doing justice between these parties, in accordance with the law. You are supreme and independent in the determination of the facts of the case, of what the facts are, as the duty lies upon me only to declare what the law is. You are bound to take from the Court its exposition of the law and resolve the facts in accordance with the law as stated to you by the Court—not in accordance with some opinion of your own of what the law should be, or what justice demands the law should be in this particular case, but you must resolve the facts in this case in conformity with the law given to you by the Court. It is by this means that justice is accomplished.

What, first, is the duty of the defendant? What duty in law does the defendant, the warehouse man, owe to the plaintiff, who stored his goods with him. The contract between these parties, gentlemen, was simply this: that the defendant agreed to take plaintiff's hops, keep them for him, and to use such care to protect them as an ordinarily prudent, careful man would exhibit under like circumstances, such care as an ordinarily prudent man would ordinarily give to the safe keeping of his own goods if he were keeping them in the same place and under the same circumstances. This plaintiff knew the place when he took the goods there, so that the defendant's obligation to use reasonable care must be interpreted in relation

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to the place itself. Defendant was to use such ordinary care as an ordinarily prudent man would use in the place to which the goods were taken, namely,—in the storage warehouse. In its storage warehouse, the defendant was bound to use such care as an ordinarily prudent man would use there to protect the goods from damage.

The allegations of the complaint, or at least in the proof upon the trial, the plaintiff seeks to have you find that this damage came by reason of the neglect of the defendant and the want of care of which I have spoken, in that it did not safeguard these hops from rats.

A storage warehouse man is not an insurer of goods. A warehouse man does not contract that when goods are delivered to him they will come back in the same condition as they were when they were put in storage. That is not his contract at all. He simply contracts that he will use ordinary care to keep them safely. If, after he has used such ordinary care, the goods are damaged, then there is no liability,—if he has used ordinary care, and it is for you to say in this case at issue, whether ordinary care was shown.

This rule of law, gentlemen, is for your observance, too; the burden of proving want of care is on the plaintiff. The plaintiff is bound to establish the want of care, the negligence of the defendant, by a fair preponderance of the credible testimony. In other words, before he can recover in this case, the plaintiff must have satisfied you by a fair preponderance of the credible testimony, that the injury occurred without fault on his part, but on account of the want of care and the negligence of the defendant. This rule goes to the extent that if, after canvassing all the testimony on both sides, you are unable to determine where the truth lies, if you are unable to say on all the proof, whether the warehouse man used ordinary care or not, then your verdict must be for the defendant, because the law is that the plaintiff must satisfy you by the greater weight of the credible testimony that the de-

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fendant was negligent, that he did not use ordinary care. The greater weight of credible testimony does not mean the greater number of witnesses or the greater mass of testimony. It simply means that the plaintiff must have produced for your consideration, evidence of greater weight—evidence to which you give credence of greater weight than that produced by the defendant. If he has done that, he has sustained the burden of producing the greater weight of credible testimony. If he has not produced the greater weight, if the scales are even, or if you are in doubt, then your verdict must be for the defendant. The plaintiff complains, and the plaintiff must show by the greater weight of evidence this lack of ordinary care.

Your first inquiry would be, what is ordinary care required of a storage warehouse man? What would an ordinarily prudent man do under such a situation as is revealed here? The plaintiff has produced evidence attempting to show that the defendant should have taken more means, more precautions, than it did to keep rats away from the goods. He says that these goods, the packages, were in good shape, were sewed up tight, and were all right when they went in; that the defendant should have seen that rats were kept out of the storage warehouse, at least as far as an ordinarily prudent man would see to that. He says that by reason of the neglect of that duty, rats were allowed to come into the warehouse, presumably, from the proof, in large numbers, and to attack these bales, to eat the hops, and to convert a large portion of them from sound hops into chaff such as has been spoken of here.

The defendant meets this issue squarely and says, "We have done all that an ordinarily prudent man could be required to do under the law. We took these goods into a warehouse such as the plaintiff knew it to be, and we have done what an ordinarily prudent man would do under the circumstances." Defendant's witnesses seek to show you that during the time, they kept cats in the

Charge

place for the purpose of driving away the mice, and that they kept traps there, and they have attempted to convince you by their evidence, that they have done in this regard, just as warehouse men generally do in the City of New York, to strengthen their contention that that is all ordinarily prudent men do, that there is no other means in use in storage warehouses for keeping out rats. We know the character of storage warehouses in New York City. Was this defendant bound, and is it possible, to keep rats out of storage warehouses? The defendant is not an insurer; it is only bound to do what reasonable men could do, and a warehouse man is not bound, as matter of law, to keep rats out of his warehouse. He is only bound to do in that respect what an ordinarily prudent man does under all the circumstances. There is the duty of these defendants to act as reasonable men should in protecting the plaintiff's property.

Defendant says further, "Not only did we do what we should be required to do, but the damage did not come, as a matter of fact it is not proven, at least in this case, that the damage came from these rats; but this is the defendant's contention that the probabilities are that this chaff was created not by rats eating into the bales, because there is no direct proof of that; but that necessarily, from the way in which these hops were handled, by being dropped from the second story window on a chute on to a box, by being carted about and stored and tried with triers and being handled to some extent, necessarily that treatment of the hops would produce at least some of this chaff and," as defendant claims, some considerable portion, if not the whole of it.

It appears that in handling the bales, in transferring them from Jarvis's warehouse to the defendant's storehouse, some of them did break open or were open when they went in. The proof on the part of the plaintiff is that while that was true, they were sewed up at the time and were actually stored away in good condition, and that

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these holes were eaten into the bags by rats as evidenced by the character of the holes, the edges being frayed, and so on.

If these goods went into that warehouse in bad condition, full of holes, then it will be for you to say whether or not putting them there in that condition the plaintiff himself did not contribute to this damage which was done by the rats, if you find the rats did the damage. If these hops were put in there with holes in the bags, leaving them open and inviting the rats to a feast, the plaintiff having put them there in that condition could hardly be heard to complain if the rats accepted the invitation. In other words, if they stored away the goods themselves in such condition as to contribute, to bring about, the damage, then the defendant would not be liable if the damage occurred, unless you found that the defendant, even in that condition of the goods, omitted some care which an ordinarily prudent man would then take. Because even if the plaintiff put the goods in exposed to rats and so on, still the defendant taking them there was bound to exhibit such care under those circumstances as an ordinarily prudent man would to keep the rats away. You will say how much that ought to be.

Take this whole case, gentlemen, as reasonable men—all of the circumstances you have heard about, these various claims—and bring your minds to this proposition of law; is it established that this damage was done by rats, and was that damage brought about by reason of the want on the part of the defendant of exhibiting the ordinary care which a prudent man should have exercised? In other words, was the damage produced by rats or was it from some other causes? Is that established, first, by a preponderance of evidence? Secondly, if it was produced by rats, did or did not defendant do what an ordinarily prudent man should have done under the circumstances? If it did, the verdict must be for the defendant. If you find that the damage was not produced or that it is not

Charge

proved that the damage was produced by rats, or if it is not proved that defendant did not exercise reasonable care, then your verdict would be for the defendant. If you find that it is established by the greater weight of credible testimony that this damage was caused by rats or mice, and that the defendant omitted the reasonable care which I have explained to you as being within his duty, then your verdict would be for the plaintiff for such amount of damages as you think the plaintiff is entitled to under the proof. He claims a damage of some \$2,749, but you are not bound by that claim. You are bound, even if you find for the plaintiff I mean—you are entitled to take into consideration all of the proof and fix upon such amount as you think will fairly recompense the plaintiff for such damage as you find was done by rats because of the defendant's want of care.

Is there anything further?

Mr. Stearns: I except to so much of your Honor's charge as stated that in case of doubt, as I understood you to say, the verdict must be for the defendant.

The Court: What do you claim; don't you claim you have got the burden of proof?

Mr. Stearns: Yes, I have got the burden of proof, but I don't think it necessarily means there must be some doubt.

The Court: I modify that. I may have used inadvertently the word "doubt." I will charge you again. I will say in case you are in doubt as to where the truth lies, so that you cannot determine for yourselves where the greater weight of evidence is, then you will find for the defendant. In other words, gentlemen, I charge you this: the burden of proof is upon the plaintiff to satisfy you by the greater weight of credible testimony that this damage was caused by rats, and was caused by the want of care which I have explained to you on the part of the defendant. If you find that the plaintiff has not satisfied you by the greater weight of such testimony, then your verdict must be for

Charge

the defendant, and I correct any other expression in my charge which may be at variance with that view.

Mr. Stearns: I have the following requests to charge, your Honor:

The defendant is a warehouse man and as such was in law bound to exercise the same care in protecting plaintiff's property from injury that a reasonable man——

The Court: I have so charged them. Point out anything I have not charged.

Mr. Stearns: The reasonable care which the defendant by its contract with the plaintiff agreed to use in protecting his hops from injury, might involve a greater or lesser degree of diligence on defendant's part according to circumstances. If the mice or rats were numerous, reasonable care would call for greater diligence in devising ways and means for their extermination.

The Court: That is another way of putting what I have already said, but I will charge it in those words.

Mr. Stearns: If the jury is satisfied—No. 5—upon the evidence——

The Court: Is this something I have not charged?

Mr. Stearns: I don't think you have charged it. I merely wanted to get this in.

The Court: I will charge that. It is another form of saying what I have already said.

"If the jury is satisfied upon the evidence that defendant's employes in charge of its warehouse had occasion from time to time to see the great damage that was being done to plaintiff's hops by rats and mice"—that is objectional, because it assumes that there was great damage done. I will modify that by saying: "Defendant's employes in charge of its warehouse had occasion from time to time to see that great damage was being done to plaintiff's hops by rats and mice, and seeing this damage, if there were any, took no further measures to protect the hops—I insert the word 'If there were any'—than it would have taken if no appreciable damage had occurred, they

Charge

may then find that this constituted a breach of defendant's contract to exercise reasonable care with respect to plaintiff's hops."

Yes, if those were the facts I will so charge.

Mr. Luscomb: I except.

Mr. Stearns: Will you charge No. 6?

The Court: I think I will leave that to the jury, whether or not a reasonable man should have inspected those goods from time to time.

Mr. Stearns: Could I have that copied on the record and except to it?

The Court: Yes. I am requested to charge that your defendant should have inspected those hops from time to time and should know the condition of the same, and whether or not they were being damaged. I don't think that is the law. I refuse to charge that except as I have charged.

Mr. Stearns: I except.

I ask your Honor to charge No. 7. Defendant was bound to notify plaintiff of any material damage to his hops within a reasonable time.

The Court: I charge that.

Mr. Stearns: You charge the jury that that is the fact,—that the defendant was bound to notify plaintiff of any material damage to his hops within a reasonable time?

The Court: Yes.

Mr. Luscomb: That is excepted to.

Has your Honor ruled upon my requests?

The Court: I think I have charged everything. What ones do you think I have not charged?

Mr. Luscomb: No. 3, if your Honor please.

The Court: I will decline that except as I have charged.

Mr. Luscomb: I except.

Does your Honor charge the fifth, as requested?

The Court: I think I have charged that, Mr. Luscomb, very fully.

Charge

Mr. Luscomb: No. 6 is practically included in your charge, as well.

The Court: I think so, yes.

Mr. Luscomb: No. 8, I don't think you charged that.

The Court: That brings up the converse of the proposition I have just charged. I don't think it is the duty of a man to go in and inspect his goods after he has stored them. I think he is entitled to rely on the law as to what the warehouse man will do.

Mr. Luscomb: Will your Honor make a direct ruling on that request No. 8?

The Court: Yes. Suppose I take some goods to a warehouse and go off to Europe four or five years; am I not entitled to do that without being charged with negligence on that account as long as I pay you?

Mr. Luscomb: I think the examination must rest in the storer; not the storee.

The Court: I don't think there is any duty to go there and look at these goods after they are stored.

Mr. Stearns: On the part of the storer?

The Court: No. You can take your chances of damage, although the warehouse man does as a reasonable man should do, and say, if they are injured, "All right; it is my fault."

Mr. Luscomb: I will take your Honor's ruling, and an exception.

Mr. Stearns: Just one more, No. 12. Will your Honor charge that specifically, or deny it?

The Court: I will state now on the record that plaintiff's counsel, at the last moment after summing up and after my charging the jury, has handed up to me some fourteen requests to charge, some of which are pertinent to this case and some of which are not at all pertinent, and that I have declined to charge any of those except as I have charged some of them; but state to counsel if he will call my attention to any principle of law which has any

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bearing on this case which I have omitted to charge, I will charge it.

Mr. Stearns: I except.

The Court: Gentlemen, you retire and take this case as reasonable men under these instructions, and find such verdict as you think will do justice between these people.

Let me say this: I don't think these parties will ever get any better jury to pass upon the facts than this present jury. So when you go out, don't be unreasonably tenacious of your own opinions, each individual, but talk it over as reasonable men with an idea of helping the Court to do justice, and remember that justice will not be done until you have agreed on a verdict.

JOHN F. YAWGER, as Receiver of the METROPOLITAN SURETY COMPANY, Appellant, v. AMERICAN SURETY COMPANY, Respondent.¹

(156 App. Div. 504; 141 Supp. 491)

Pleading; complaint; demurrer; surety; contribution; action by surety on bond of public officer against former surety for amount paid by reason of losses in years prior to time plaintiff became surety

1. Where it was alleged in the complaint that the plaintiff, a surety company, had been compelled to pay the amount which

¹ For complaint from this case, see *post*, page 193.

For complaint in action for contribution between sureties on a bond given to the State to secure deposit in a bank, from *Barnes v. Cushing*, 168 N. Y. 542, see 1 BRADBURY'S FORMS OF PL. 192.

For complaint in an action on a surety bond of a county treasurer to recover money lost to individuals by reason of unauthorized investments made by the former county treasurer, from *County of Erie v. Diehl*, 196 N. Y. 501, see BRADBURY'S RULES OF PL., page 959.

For complaint in action on surety bond to secure payment of agreed price for work under a construction contract from *Burfeind v. People's Surety Co.*, 203 N. Y. 602, see 2 BRADBURY'S PL. & PR. REP. 35.

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a supervisor had lost by depositing moneys of the town for which he acted, in an insolvent bank, although a portion of the money was deposited prior to the time the plaintiff became such surety, and another portion after the plaintiff became surety; and it was alleged that the defendant was the surety on the bond of such supervisor prior to the time that the plaintiff became such surety, and judgment was demanded for the amount of money which the plaintiff had been compelled to pay representing the deposits made by the supervisor prior to the time the plaintiff became surety and while the defendant was such surety, it was held that the complaint stated a cause of action for contribution and the demurrer thereto interposed by the defendants should be overruled and the defendant permitted to answer.

Appeal by the plaintiff, John F. Yawger, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 10th day of July, 1912, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining a demurrer to the complaint.

John Burlinson Coleman, of counsel [*Edward R. Finch*, attorney], for the appellant.

Carl Ehlermann, Jr., of counsel [*Barber, McGuire & Ehlermann*, attorneys], for the respondent.

CLARKE, J.:

The action is brought by the receiver of the Metropolitan Surety Company. The complaint alleges that on April 4, 1905, one Grisko was elected supervisor of the town of Cicero, Ill., for the term of one year, until his successor should be elected and qualified; that under the charter of said town the supervisor was *ex officio* the treasurer, and required to give a bond, conditioned that he will faithfully account for all moneys that may come into his hands, etc.; that on the 25th of April, 1905,

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Grisko, as principal, and the defendant American Surety Company, as surety, duly executed and delivered to said town a bond in the sum of \$100,000 upon the condition that the said Grisko should faithfully account for all moneys that might come into his hands as such supervisor, and pay over the same pursuant to the provisions of law or the order or resolution of the board of trustees of said town, and should faithfully perform the duties of his office to the best of his skill and abilities; that between the 25th of April, 1905, and the 16th day of April, 1906, Grisko, as treasurer, deposited in a private banking institution called the Lincoln Bank, a certain amount set forth, and during said period drew out a certain amount set forth. Upon the 16th of April, 1906, he had on deposit in the account in said bank a balance of funds of said town of Cicero amounting to \$41,529.78; that on said day, and for several months prior thereto, the said private banking institution operated as the Lincoln Bank, and the said William J. Atkinson, who was the sole owner and proprietor thereof, were hopelessly insolvent; that on April 4, 1906, Grisko was again elected supervisor for the term of one year until his successor should be elected and should have qualified; that on the 16th of April, 1906, Grisko, as principal, and the Metropolitan Surety Company, as surety, executed a bond similar in all respects to the one heretofore referred to, given by the American Surety Company for the preceding year; that Grisko acted as supervisor during the term specified in said bond until he retired from office on or about the 20th day of May, 1907, on which date his successor, who had been duly elected, qualified; that the bond given by the Metropolitan Surety Company was not given nor accepted as a compromise with the town of the claim against the American Surety Company on its bond, and that said bond of the American Surety Company was not surrendered up or canceled, and remained in full force and effect; that at the time of the making and delivery of the Metropolitan Surety Com-

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pany's bond neither said company nor any of its officers knew that the Lincoln Bank and Atkinson were insolvent, or that the funds belonging to the said town had been deposited in the said private bank by Grisko; that on April 16, 1906, upon the said Grisko qualifying as supervisor for the year commencing April, 1906, he did not then nor thereafter withdraw from the said bank any of the balance, amounting to \$41,529.78, which he had on deposit at the conclusion of his previous term of office as supervisor; nor could the said balance have been withdrawn on account of the insolvency of said private banking institution; that said Grisko, for the term ending April 16, 1906, did not and could not, on account of the aforesaid insolvency of the said private banking institution, pay over to himself, as supervisor and *ex-officio* treasurer for the year commencing April 16, 1906, said balance; that Grisko, from April 16, 1906, to October 23, 1906, deposited \$12,061.13 in said bank, and drew out \$100, and that on the 23d of October, 1906, he had, as treasurer of the said town, on deposit in said bank a balance of money belonging to the town of \$53,490.91, which included the balance of \$41,529.78 which he had on deposit on the 16th of April, 1906, as hereinbefore set forth; that the said Grisko, as supervisor, for his term of office commencing April 16, 1906, continued and operated the aforesaid account in the said Lincoln Bank in the same manner as he had during his previous term as supervisor, as herein set forth. On or about December 17, 1906, proceedings in bankruptcy were taken against Atkinson, operating under the name of Lincoln Bank, so that he was thereafter adjudicated a bankrupt, and by reason of his insolvency and bankruptcy none of the said balance was ever paid over or returned to Grisko or the town; that the said Grisko failed and neglected to account for said \$53,490.91 to the town and failed to pay over said sum to his successor as supervisor as required by law; that as a result of such failure the town prosecuted an action against Grisko and the Metropolitan

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Surety Company, as surety, for said sum of money, including the \$41,529.78 which Grisko had on deposit at the conclusion of his first term of office, and that a judgment was rendered in favor of the town, which, on appeal to the appellate court and the Supreme Court of Illinois, was affirmed; that as a result of said judgment the plaintiff, pursuant to an order of the New York Supreme Court, paid to the town of Cicero the sum of \$58,000, no part of which has been returned except the sum of \$2,401.05 paid by the trustee in bankruptcy of Atkinson; that on account of the payment of the said sum of \$58,000 by the plaintiff to the town of Cicero, the said town, before the commencement of this action, by an instrument in writing, duly assigned, transferred and set over to the plaintiff the aforesaid bond executed by the defendant and Grisko, together with any and all claims or causes of action arising under or by virtue of the said bond against the American Surety Company; that the said Grisko is a non-resident of this State, and is now and ever since the failure of the said Lincoln Bank has been insolvent and unable to make good to the plaintiff the whole or any part of the said \$58,000 paid by the plaintiff as aforesaid. The complaint alleges the due demand and refusal and an order authorizing him to sue, and demands judgment as follows: 1. That this court inquire into and take proof of the amount paid by the plaintiff upon the said claim, and that the defendant be adjudged and ordered to contribute to the plaintiff the sum of \$41,529.78, together with interest, its proportionate ratable share of the claim so paid by the plaintiff or such other sum as this court may decide to be the proportionate ratable share of the claim so paid by the plaintiff. 2. That this plaintiff may have such other and further relief as to the court may seem just and proper.

To this complaint the defendant demurred upon the ground, *first*, that it appears upon the face of the complaint that alleged causes of action have been improperly united in that it appears from the allegation that the complain-

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ant has joined inconsistent causes of action in subrogation, contribution and assignment; *second*, that the complaint does not state facts sufficient to constitute a cause of action. The Special Term sustained the demurrer on the latter ground, stating in its opinion: "The plaintiff, to make out a good cause of action, must allege that the loss or a portion of it occurred during Grisko's first term of office, namely, during the period for which the defendant was his surety. There is no such allegation. * * * *Non constat* but that Grisko was then solvent and had other funds from which he could have made up any deficiency for which he was liable."

In brief this is an action by the surety upon an official's bond, for his second term, which has had to pay a judgment for the default of its principal, to recover against the surety upon his bond for his first term, for so much of the sum recovered against it as was not accounted for by the principal during his first term, when the defendant was his surety.

The respondent cites several cases in the attempt to show that the second surety, to wit, the plaintiff, was not bound for the acts or defaults of the principal prior to the term for which it gave its bond, but the difficulty with that argument is that the plaintiff most strenuously contended therefor and was beaten. In *Town of Cicero v. Grisko and Metropolitan Surety Company* (240 Ill. 220) it raised the point that a large part of the loss occurred before it, the Metropolitan Surety Company, became surety and for such loss it was not liable, but the court said: "It is also contended that the bank was insolvent before the Metropolitan Surety Company became surety for Grisko and that the greater portion of the loss occurred before that time. This question has been settled contrary to appellant's contention." (Citing cases.) The leading case cited, *Morley v. Metamora* (78 Ill. 394), holds that where a supervisor is elected his own successor, and gives a new bond, the sureties are liable on such bond for any

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amount which appears to have been in the hands of such supervisor, belonging to the town, at the end of the preceding official term. "It was as much his duty to account for whatever funds were in his hands at the end of the first year as it was to account for whatever should be received during the second year. The law made the sureties responsible for any default in that regard. There could be no action maintained against the sureties on the first bond at the expiration of that year, for there was no one who could make a demand for the money the supervisor reported as having in his hands, so as to establish a default."

The consequence is that the Metropolitan Surety Company was held liable on its bond for the amount which ought to have been in the hands of Grisko at the end of the term covered by the bond of the American Surety Company. Therefore, the bonds did overlap. The argument advanced by respondent would be very forceful to let out the second surety, but the second surety was not let out when it made the same argument.

There is no case precisely like this presented in the briefs. The doctrine of contribution rests not upon the contract but upon the principle that equality of burden as to common right is equity. This is illustrated by *Barnes v. Cushing*, 168 N. Y. 542, and when it came back for a new trial (71 App. Div. 366; 75 Supp. 953). This was a case where there were cosureties extending over one period and then a second period in which one of these cosureties had refused to go on a further bond. A default having occurred and it having been made to appear that a portion of the balance due had accrued during the period of the first bond, although the recovery had been had against the obligors on the second bond, a recovery was sustained by the surety who paid the judgment against his cosurety on the first bond for the amount for which the principal was accountable while that bond was in existence, but there there was a joint obligation over the same period and the general rule

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in regard to contribution was applicable as stated by Story (Eq. Juris., § 495): "It matters not in case of a debt whether the sureties are jointly and severally bound or only severally; or whether their suretyship arises under the same obligation or instrument or under divers obligations or instruments if all the instruments are for the same identical debt." We lately considered this question of contribution in *Hard v. Mingle*, 141 App. Div. 170; 126 Supp. 51; aff'd, 206 N. Y. 179.

It seems to me that by the decision of the Illinois court these two sureties were, in effect, cosureties for a single debt. The Metropolitan Company was held upon the theory that \$41,529.78 was in Grisko's hands at the time that it gave its bond. Events showed that it was not, although it ought to have been, and the complaint alleges that the precise fact, namely, the insolvency of the depository, upon which was based the judgment against the plaintiff for the full amount of \$58,000, was in existence and had caused \$41,529.78 of the deficiency found by the judgment during the period covered by the defendant's bond. If an accounting had been called for at the end of the first term, if a demand had been made at the end of that term, the fact of the deficiency would have been then shown and there would have been no doubt that the defendant would have been responsible. That there was no accounting was due to the fact that the supervisor succeeded himself.

In *United States v. Eckford's Executors*, 1 How. U. S. 250, the term of Swartwout as collector of customs at New York commenced on March 29, 1830, for a term of four years, and on the 22d of June, 1830, he gave a bond for the faithful discharge of his duties with several sureties, one of whom was Henry Eckford. Swartwout's third term commenced on March 29, 1834. Eckford was not one of the sureties on the new bond. The United States Supreme Court said: "On the 29th of March, 1834, * * * a large apparent balance was due to the government by him

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[Swartwout]. * * * Did it arise from a misapplication of the public money during the preceding term? If so, the sureties of the preceding term are liable for the amount thus misapplied."

The fact that everybody was in ignorance cannot exonerate the defendant from its obligation, which the plaintiff has paid under stress of the judgment. I think there is enough in this complaint to put defendant to its answer.

The interlocutory judgment should be reversed, and the demurrer overruled, with costs and disbursements to the appellant, with leave to the respondent to withdraw the same and plead over on payment thereof.

McLAUGHLIN and LAUGHLIN, JJ., concurred; INGRAHAM, P. J., and DOWLING, J., dissented.

INGRAHAM, P. J. (dissenting):

One Grisko was duly elected to the office of supervisor of the town of Cicero in the county of Cook, State of Illinois, on the 4th day of April, 1905, and as such supervisor he gave to the town of Cicero a bond as principal, with the defendant as surety, in the penal sum of \$100,000. The condition of the obligation was that if the said Louis Grisko should faithfully account for all moneys that might come into his hands as such supervisor, and pay over the same pursuant to the provisions of law or the order or resolution of the board of trustees of the town of Cicero, and should faithfully perform the duties of this obligation to the best of his skill and ability, then the obligation was to be void, otherwise to remain in full force and effect.

The complaint alleges that the town of Cicero was a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois, and by its charter it was provided that the supervisor should be *ex-officio* treasurer of the said town, and should receive and hold all moneys belonging to the town arising from

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general or special tax, special assessments, fines, penalties or otherwise, and that he should upon entering upon the duties of his office execute a bond to the town of Cicero in such amounts and with such sureties as should be determined by the board. It was also his duty to keep a correct account of such moneys received and paid out by him, and he was required to furnish from time to time to the board a statement of the moneys in his hands. That Grisko was elected supervisor of the said town on the 4th day of April, 1905, for the term of one year and until his successor should be elected and qualify. That said Grisko, as principal, with the defendant, as surety, executed and delivered to the town the bond above mentioned and duly qualified as such supervisor for the term commencing in the month of April, 1905, and entered upon the discharge of his official duties as such and continued in the exercise of his duties for the full term mentioned in such bond. That there then existed a private banking institution owned and operated by one Atkinson, under the name or style of the Lincoln Bank, in which institution the supervisor deposited money received by him in his official capacity. So that on the 16th of April, 1906, he had on deposit in the said bank a balance of the funds of the town of Cicero amounting to \$41,529.78. That on the said 16th of April, 1906, and for several months prior thereto the said banking institution, operated as the Lincoln Bank, and the said Atkinson were hopelessly insolvent. That on or about the 4th day of April, 1906, the said Grisko was re-elected supervisor of the said town of Cicero for the following year, and that on the 16th of April, 1906, said Grisko, as principal, and the plaintiff, as surety, executed and delivered to the said town of Cicero a bond similar in all respects to the bond executed by the defendant, a copy of which is also annexed to the complaint. That after the last-mentioned bond had been executed and delivered as aforesaid, Grisko acted as supervisor of the said town until he retired from office on

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or about the 20th of May, 1907, on which date his successor qualified by filing his bond as supervisor. That on the 16th of April, 1906, when the said Grisko qualified as supervisor for the ensuing year, he did not then or thereafter withdraw from the said Lincoln Bank any of the aforesaid balance of \$41,529.78 which he had on deposit in the said bank as supervisor and *ex-officio* treasurer of the town of Cicero, nor could the said balance have been withdrawn on account of the insolvency of said private banking institution as therein set forth. That the said Grisko after the 16th of April, 1906, and until the 23d of October, 1906, deposited various sums of money belonging to the town of Cicero in the said Lincoln Bank and withdrew from the said Lincoln Bank the sum of \$100. That on the 23d of October, 1906, the said Grisko as supervisor and *ex-officio* treasurer of the town of Cicero had on deposit in the said Lincoln Bank a balance belonging to the said town of \$53,490.91, which included the \$41,529.78 which he had on deposit on the 16th of April, 1906. That on the 17th of December, 1906, Atkinson, operating under the name of the Lincoln Bank, was adjudicated a bankrupt, and in consequence thereof none of the balance, amounting to \$53,490.91, on deposit with the said Lincoln Bank was ever paid over or returned to Grisko or to the town of Cicero, and Grisko failed and neglected to account for the said sum of money to the town of Cicero or to pay over the same to his successor. That in consequence thereof the town of Cicero instituted an action in the courts of the State of Illinois to recover the amount due from Grisko to the town of Cicero, which resulted in a judgment in favor of the town against the plaintiff, which the plaintiff subsequently paid. This action was instituted by the plaintiff, the surety on the second bond for the year commencing in April, 1906, against the defendant, the surety on the first bond for the year commencing in April, 1905. The question presented is whether on the allegations of this complaint the surety

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on the first bond is liable to the surety on the second bond for the amount that it was required to pay because of the failure of Grisko to account for the moneys in his hands belonging to the town on the election of his successor in May, 1907.

Grisko was supervisor and *ex-officio* treasurer of this town of Cicero for the year commencing April 4, 1905, and until his successor was appointed and duly qualified, and the defendant was surety upon the bond that he gave under the provisions of the charter of the town. The bond given by the plaintiff was to be void if Grisko should faithfully account for all moneys that came into his hands as such supervisor and pay over the same pursuant to the provisions of law or the order or resolution of the board of trustees of the town of Cicero and should faithfully perform the duties of his office to the best of his skill and ability. If this condition was complied with the bond was void; and to entitle the plaintiff to recover, it must appear that the principal Grisko failed to fulfill the conditions of this bond. When in April, 1906, he was duly elected to succeed himself as supervisor for the ensuing year, he had on deposit in this bank a certain sum of money which he had received as supervisor and treasurer and for which he was liable to account to the town. He had not up to that time failed to account for any money that had come into his hands as such supervisor or failed to pay over the same according to the provisions of law or order or resolution of the board of trustees of the town, nor, so far as appears, had he failed to perform his duties to the best of his skill and ability. When the electors of the town re-elected Grisko as supervisor they elected him to require an accounting from himself for the money that he had on hand, and he, in pursuance of the authority thus conferred upon him, took over and continued the account with this Lincoln Bank of the moneys that he had there on deposit to his credit as supervisor. So far as appears, and I think from the statements of the complaint

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the inference is justified that that money on deposit was treated by him as the money of the town and continued into his new term, there is no allegation of bad faith on the part of Grisko, no allegation that he had failed to account for the money; no allegation that he had any knowledge that the bank was insolvent or the money in jeopardy—nothing but the fact that the bank was insolvent. And there was nothing by which it would appear as to how largely insolvent it was, or how much money if it had been then drawn out or attempted to have been drawn out would have been lost to the town. The bank was not adjudicated a bankrupt until the 17th of December, 1906, eight months after the re-election of Grisko, and there certainly can be no presumption, from the mere fact of general insolvency, that if Grisko had been compelled to account to another successor all or any portion of the money on deposit would have been lost to the town in consequence of the insolvency of the bank. Apparently it continued to do business for eight months after Grisko's re-election, and there is nothing to show that if the supervisor had drawn checks upon the account they would not have been paid except the allegation of a conclusion that the money could not have been drawn out on account of the insolvency of the institution. On these allegations, therefore, I do not see how it can be said that the condition of this obligation was broken so that the defendant became liable. Certainly if Grisko's successor had been appointed and he had turned over to his successor this account in the bank as money in his hands belonging to the town, and his successor had accepted the transfer of that account as a transfer of the money belonging to the town, and then it had been lost by the subsequent failure of the bank eight months after Grisko's successor had been elected, there would have been no obligation as against the defendant and no action upon the bond could have been maintained. It seems to me that upon the allegations of the complaint the same result must follow

from Grisko's continuing the amount in the bank and accepting it as a transfer of the town's money to himself as his own successor and giving a new bond with the plaintiff as surety for the faithful accounting of money that he had in his hands at that time and that he should thereafter receive.

When the town sued the plaintiff (see 240 Ill. 220) it was held that the plaintiff was liable as surety for Grisko upon his failure to pay over to his successor all moneys that had come into his hands as such supervisor which had not been paid out by him pursuant to the provisions of law, or order, or resolution of the board of trustees, or otherwise lawfully accounted for by him, and that the amount for which he was liable upon the qualification of his successor in 1907 was the amount that he had on deposit in this Lincoln Bank. To justify that judgment it is apparent that Grisko must have been chargeable with the amount on deposit in the Lincoln Bank at the end of his year of service following his election in April, 1905, and it apparently was based upon this failure to account for the money in his possession, namely, the amount on deposit in the Lincoln Bank, that the plaintiff was held to have violated the condition of the bond it gave in April, 1906. But the liability of the defendant here depends upon the terms and conditions of the obligation that it gave, and as long as the condition upon which its liability depended was not broken the defendant was not responsible.

I think, therefore, that no cause of action was alleged and that the demurrer was properly sustained.

DOWLING, J., concurred.

Judgment reversed, with costs, and demurrer overruled, with costs, with leave to respondent to withdraw demurrer and to answer on payment of costs.

Complaint

Form No. 16

Complaint; Surety; Contribution; Action by Surety on Bond of Public Officer against Former Surety for Amount Paid by Reason of Losses in Years Prior to Time Plaintiff Became Surety¹

Supreme Court of New York, County of New York.

John F. Yawger, as Receiver of
the Metropolitan Surety
Company,

Plaintiff,

against

American Surety Company,
Defendant.

The above-named plaintiff, by Edward R. Finch, his attorney, complaining of the defendant, shows to this court and alleges, upon information and belief:

I. That at all the times herein mentioned up to the 6th day of January, 1909, the Metropolitan Surety Company was a corporation organized and existing under and by virtue of the Laws of the State of New York, and engaged in transacting a surety business in the States of New York and Illinois and elsewhere.

II. That on or about the 6th day of January, 1909, an action was commenced in the Supreme Court of the State of New York, in the County of Albany, by the Attorney General of the State of New York, in the name of the People of the State of New York, as plaintiffs, against the said Metropolitan Surety Company, as defendant, for the purpose of procuring a dissolution of the said Metropolitan Surety Company. That on the 6th day of January, 1909, by an order of the Supreme

¹ From *Yawger v. American Surety Co.*, 156 App. Div. 504; 141 Supp. 491. See *ante*, page 179.

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Court, Albany County, duly made and entered and filed in the said action in the Office of the Clerk of the County of Albany, John F. Yawger, the plaintiff herein, was duly appointed temporary receiver of the said Metropolitan Surety Company. That thereafter, by a decree duly made in the said action, dated the 30th day of January, 1909, and duly entered and filed in the Office of the Clerk of the County of Albany, the said Metropolitan Surety Company was dissolved and the said John F. Yawger, the plaintiff herein, was duly appointed permanent receiver of the said Metropolitan Surety Company, and was directed to make a fair and just distribution of the property of the said Metropolitan Surety Company and of the proceeds thereof among its stockholders and its fair and honest creditors, in the order and in the proportion prescribed by law. That the said John F. Yawger thereupon duly qualified as such permanent receiver and is now acting as such. That a copy of said decree is hereto annexed and marked Exhibit "A" and made a part of this complaint the same as if it were herein set forth at length.

III. That the defendant, the American Surety Company of New York, is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the Laws of the State of New York, and engaged in transacting a surety business in the States of New York and Illinois and elsewhere.

IV. That the Town of Cicero is now, and at all the times herein mentioned was, a municipal corporation, organized and existing under and by virtue of the laws of the State of Illinois, and located immediately west of and adjoining the City of Chicago in the State of Illinois. That the said Town of Cicero is now, and at all the times herein mentioned was, organized under and existed by virtue of a special charter, granted by the Legislature of the State of Illinois, approved March 25, 1869, and appearing in the Private Laws of Illinois, of 1869, Vol. 3, at page 666. By § 3 of the said Charter the office of

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Supervisor of the Town of Cicero is created; and by § 5 of the said Charter it is provided that the Supervisor shall be *ex-officio* Treasurer of said Town. The said Supervisor's duties and obligations as treasurer of the Town of Cicero are defined by the said § 5 of the said Charter of the Town of Cicero as follows:

"The Supervisor of said Town shall be *ex-officio* the treasurer of said Town, and he shall receive and hold all moneys belonging to the Town arising from general or special tax, special assessments, fines, penalties or otherwise, and he shall, upon entering upon the duties of his office, execute a bond to the Town of Cicero, in such sum and in such sureties as shall be determined by the Board, conditioned that he will faithfully account for all moneys that may come into his hands, and will pay the same over pursuant to the provisions of law or the orders or resolutions of the Board, and that he will faithfully perform the duties of his office. It shall be his duty to keep a correct account of all moneys received and paid out by him, and when required, to furnish from time to time to the Board a statement of the moneys in his hands, and he shall receive such compensation as such treasurer as shall be allowed him by such Board, not exceeding 2 per cent upon all moneys received by him."

That said Board referred to in the foregoing quotation is the Board of seven trustees of the said Town of Cicero, of which the said Supervisor is *ex-officio* one.

V. That on or about the 4th day of April, 1905, one, Louis Grisko, was elected Supervisor of the said Town of Cicero for the term of one year, and until his successor should be elected and qualified.

VI. That on or about the 25th day of April, 1905, the said Louis Grisko, as principal, and the said defendant American Surety Company of New York, as surety, duly executed under seal and delivered to the said Town of Cicero a certain bond in the penal sum of \$100,000 in favor of the said Town of Cicero, by which bond the said

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defendant, American Surety Company of New York, bound itself to the said Town of Cicero in the said sum of \$100,000, upon the condition that the said Louis Grisko should faithfully account for all moneys that might come into his hands as such Supervisor and pay over the same pursuant to the provisions of law or the order or resolution of the Board of Trustees of the Town of Cicero, and should faithfully perform the duties of his office to the best of his skill and abilities. That hereto annexed and marked Exhibit "B" is a copy of said bond, which the plaintiff refers to and makes a part of this complaint the same as if it were herein set forth at length.

VII. That the said Louis Grisko thus duly qualified as such Supervisor for the term commencing in the month of April, 1905, and thereupon entered upon the discharge of his official duties as such Supervisor, and continued in and exercised his said office through the whole of the term specified in said bond.

VIII. That in the said month of April, 1905, and thereafter, as set forth in this complaint, there existed and was located in the said Town of Cicero a private banking institution owned and operated by one William W. Weare under the name or style of William W. Weare & Co. That in or about the month of August, 1905, the said William W. Weare sold and transferred the said private banking institution, operated as aforesaid, together with all its assets of every kind and nature, including the deposits hereinafter set forth, to one William J. Atkinson, who assumed all the liabilities and obligations of said private banking institution and who continued to operate said private banking institution under the name or style of the Lincoln Bank.

IX. That commencing on the 25th day of April, 1905, and continuing until the 16th day of April, 1906, the said Louis Grisko, as Supervisor and *ex-officio* Treasurer of the said Town of Cicero, deposited the following sums of money belonging to the said Town of Cicero in his ac-

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count as such Treasurer in said private bank on the days hereinafter set forth, to wit:

1905.

April 25.....	\$ 399.95
May 1.....	5,000.00
May 15.....	2,411.61
June 10.....	8,545.31
July 10.....	2,198.51
Aug. 7.....	1,874.65
Oct. 16.....	6,653.21
Dec. 14.....	5,226.95

1906.

Feb. 24.....	3,414.47
Apr. 12.....	8,466.73

That the said Louis Grisko, as Supervisor and *ex-officio* Treasurer of the said Town of Cicero, withdrew from the amount on deposit in said account in the said private bank, the following sums of money on the following days, to wit:

1905.

May 1.....	\$ 250.00
May 3.....	1,217.68
May 4.....	117.45
May 5.....	87.70
May 5.....	121.50
May 5.....	32.18
May 6.....	23.33
May 8.....	123.65
May 9.....	175.14
May 10.....	55.00
May 11.....	425.00
May 13.....	24.98
May 13.....	8.00

That upon the 16th day of April, 1906, the said Louis Grisko, as Supervisor and *ex-officio* Treasurer of the said Town of Cicero, had on deposit in said account in said

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private bank a balance of funds of the said Town of Cicero amounting to the sum of \$41,529.78.

X. That upon the said 16th day of April, 1906, and for several months prior thereto, the said private banking institution, operated as the Lincoln Bank, and the said William J. Atkinson, who was the sole owner and proprietor thereof, were hopelessly insolvent.

XI. That on or about the 4th day of April, 1906, the said Louis Grisko was again elected Supervisor of the said Town of Cicero for the term of one year and until his successor should be elected and qualified.

XII. That on or about the 16th day of April, 1906, the said Louis Grisko, as principal, and the said Metropolitan Surety Company, as surety, executed and delivered to the said Town of Cicero a bond similar in all respects to the bond hereinbefore referred to executed by the defendant, American Surety Company of New York, upon the occasion of the said Louis Grisko's previous election as Supervisor as hereinbefore set forth, in the penal sum of \$100,000 in favor of the said Town of Cicero, by which bond the said Metropolitan Surety Company bound itself in said sum of \$100,000 to the said Town of Cicero, upon the condition that the said Louis Grisko should faithfully account for all moneys that might come into his hands as such supervisor and pay over the same pursuant to the provisions of law or the order for or resolution of the Board of Trustees of the Town of Cicero and should faithfully perform the duties of his office to the best of his skill and abilities. That a copy of said bond is hereto annexed and marked Exhibit "C" and made a part of this complaint the same as if it were herein set forth at length.

XIII. That after said last-mentioned bond had been duly executed and delivered as aforesaid, the said Louis Grisko acted as Supervisor of the said Town of Cicero during the term specified in said last-mentioned bond until he retired from office on or about the 20th day of

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May, 1907, on which date his successor, one Walenty G. Kasperski qualified by filing his bond as Supervisor, the said Walenty G. Kasperski having been duly elected Supervisor of the said Town of Cicero at the election held in said Town of Cicero on or about the 4th day of April, 1907.

XIV. That the said bond so given by the Metropolitan Surety Company to the Town of Cicero was not given by the said Metropolitan Surety Company nor accepted by the said Town of Cicero as a compromise of the claim of the said Town of Cicero against the defendant, American Surety Company of New York, on the bond given by the said defendant, American Surety Company of New York, to the said Town of Cicero heretofore set forth herein; and that the said bond given by the said defendant American Surety Company of New York, to the said Town of Cicero was not surrendered up or cancelled and remained in full force and effect.

XV. That at the time of the making, execution and delivery of the aforesaid bond by the said Metropolitan Surety Company to the Town of Cicero, neither the said Metropolitan Surety Company, nor any of its officers, agents, servants or employes knew that the said private banking institution operated as the Lincoln Bank and the said William J. Atkinson were insolvent, nor did the said Metropolitan Surety Company, nor any of its officers, agents, servants or employes know that the funds belonging to the said Town of Cicero had been deposited in the said private banking institution by the said Louis Grisko.

XVI. That upon the said 16th day of April, 1906, upon the said Louis Grisko qualifying as supervisor of the said Town of Cicero for the year commencing April, 1906, he did not then nor thereafter withdraw from the said Lincoln Bank any of the aforesaid balance, amounting to \$41,529.78, which he had on deposit in said account in said Lincoln Bank as Supervisor and *ex-officio* Treasurer of the said Town of Cicero at the conclusion of his previous

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term of office as Supervisor of the said Town of Cicero, terminating April 16, 1906; nor could the said balance have been withdrawn on account of the insolvency of said private banking institution as herein set forth. That the said Louis Grisko, as Supervisor and *ex-officio* Treasurer of the Town of Cicero for the term ending April 16, 1906, did not and could not, on account of the aforesaid insolvency of the said private banking institution, pay over to himself, as Supervisor and *ex-officio* Treasurer of the said Town of Cicero for the term commencing April 16, 1906, said balance in said private banking institution. That the said Louis Grisko from the said 16th day of April, 1906, until the 23d day of October, 1906, deposited the following sums of money belonging to the said Town of Cicero in the said account in said Lincoln Bank on the days hereinafter set forth, to wit:

1906.

May 9.....	\$ 100.00
May 16.....	6,290.50
July 20.....	3,302.63
Sept. 12.....	1,408.00
Oct. 23.....	960.00

That the said Louis Grisko, as Supervisor and *ex-officio* Treasurer of the said Town of Cicero, withdrew from said account in the said Lincoln Bank the following sums of money belonging to the said Town of Cicero on the following days, to wit:

May 9, 1906.....\$100.00.

That on the 23d day of October, 1906, the said Louis Grisko, as Supervisor and *ex-officio* Treasurer of the said Town of Cicero, had on deposit in said account in the said Lincoln Bank a balance of money belonging to the said Town of Cicero amounting to \$53,490.91, which said sum included the balance of \$41,529.78, which the said Louis Grisko, as Supervisor and *ex-officio* Treasurer of the

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said Town of Cicero, had on deposit in the said account in the said Lincoln Bank on the 16th day of April, 1906, as hereinbefore set forth.

XVII. That the said Louis Grisko, as Supervisor and *ex-officio* Treasurer of the Town of Cicero, for his term of office commencing April 16, 1906, continued and operated the aforesaid account in the said Lincoln Bank in the same manner as he had during his previous term as Supervisor, as herein set forth.

XVIII. That on or about the 17th day of December, 1906, proceedings were taken against the said William J. Atkinson, operating under the name or style of the said Lincoln Bank, so that he was thereafter adjudicated a bankrupt under the laws of the United States.

XIX. That by reason of the insolvency and bankruptcy of the said William J. Atkinson, doing business under the name or style of the Lincoln Bank, none of said balance, amounting to \$53,490.91, on deposit in the said Lincoln Bank for the account of the said Louis Grisko, as Supervisor and *ex-officio* Treasurer of the Town of Cicero, was ever paid over or returned to the said Louis Grisko or the said Town of Cicero. That the said Louis Grisko failed and neglected to account for said \$53,490.91 to the Town of Cicero and failed to pay over said sum to his successor as Supervisor, the said Walenty G. Kasper-ski, as required by law.

XX. That as a result of such failure of the said Louis Grisko to account for and pay over said moneys to the said Town of Cicero or his successor in office, the said Town of Cicero instituted and prosecuted in the Municipal Court of Chicago, County of Cook and State of Illinois, a certain action against the said Louis Grisko and the said Metropolitan Surety Company as surety on the aforesaid bond for the recovery of said sum of money, including the aforesaid sum of \$41,529.78, the balance which the said Louis Grisko, as Supervisor and *ex-officio* Treasurer of the Town of Cicero, had on deposit in said private

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banking institution at the conclusion of his term of office ending April 16, 1906. That such proceedings were had in such action that on or about the 23d day of January, 1908, a judgment in said action was rendered in favor of the said Town of Cicero, plaintiff, and against the said Louis Grisko and the said Metropolitan Surety Company, as defendants, for the sum of \$55,288.80, being the amount of the aforesaid balance of \$53,490.91 together with interest at five per centum per annum from the 20th day of May, 1907, and costs. That the said Metropolitan Surety Company thereupon duly appealed to the Appellate Court of the State of Illinois, First District, from said judgment, and duly prosecuted said appeal; but that said judgment was by said Appellate Court affirmed upon said appeal. That the said Metropolitan Surety Company thereupon duly appealed to the Supreme Court of Illinois, the court of last resort in said State of Illinois, from said judgment and duly prosecuted said appeal; but that said judgment was by said Supreme Court of Illinois affirmed on said appeal.

XXI. That as a result of said judgment and affirmance thereof, plaintiff in the above-entitled action, pursuant to an order of the Supreme Court of New York, Albany County, duly made in the aforesaid action of The People of the State of New York against The Metropolitan Surety Company duly made and entered in the Office of the Clerk of the County of Albany on the 27th day of September, 1909, paid to the Town of Cicero the sum of \$58,000. That no part of the said \$58,000 has been repaid or returned to the said Metropolitan Surety Company or to the plaintiff as the receiver thereof, by the said Louis Grisko, or the said William W. Weare, or the said William W. Weare & Co., or the said William J. Atkinson, or the said Lincoln Bank, except the sum of Twenty-four hundred and one 05/100 dollars, which was paid to the plaintiff by the Trustee in Bankruptcy of the said William J. Atkinson, doing business as the said Lincoln Bank, on the 16th day of

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May, 1910. That on account of the payment of the said sum of \$58,000 by the plaintiff to the said Town of Cicero, the said Town of Cicero before the commencement of this action, by an instrument in writing, duly assigned, transferred and set over to the plaintiff, as receiver of the said Metropolitan Surety Company, the aforesaid bond executed by the defendant, American Surety Company of New York, and Louis Grisko to the said Town of Cicero, together with any and all claims or causes of action arising under or by virtue of the said bond against the defendant, American Surety Company of New York.

XXII. That the said Louis Grisko is a non-resident of this State and is now, and ever since the failure of the said Lincoln Bank has been, insolvent and unable to make good to the plaintiff the whole or any part of the sum of \$58,000 paid by the plaintiff as aforesaid to the Town of Cicero.

XXIII. That on or about the 21st day of June, 1911, plaintiff duly demanded from the defendant that it pay to the plaintiff the sum of \$41,529.78 due to the plaintiff by reason of the aforesaid facts. That said defendant refused and still refuses to pay the whole or any part of said sum.

XXIV. That on or about the 14th day of October, 1911, an order was duly made and entered in the aforesaid action of The People of the State of New York against the Metropolitan Surety Company in the Office of the Clerk of the County of Albany authorizing and permitting the plaintiff herein to institute this action against the defendant, American Surety Company of New York.

WHEREFORE, plaintiff demands judgment against the defendant as follows:

1. That this Court inquire into and take proof of the amount paid by the plaintiff upon the said claim and that the defendant be adjudged and ordered to contribute to the plaintiff the sum of \$41,529.78, together with interest, its proportionate ratable share of the claim so paid by the plaintiff, or such other sum as this Court may decide

Complaint—Exhibit "A"

to be the proportionate ratable share of the claim so paid by the plaintiff.

2. That the plaintiff may have such other and further relief as to this Court may seem just and proper in the premises.

EDWARD R. FINCH,
Attorney for Plaintiff,
32 Nassau Street,
Borough of Manhattan,
City of New York.

[*Verification.*]

EXHIBIT "A"

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany at the City Hall in the City of Albany, State of New York, on the thirtieth day of January, 1909.

Present: Hon. GEORGE H. FITTS, *Justice*.
Supreme Court, Albany County.

The People of the State of New
York,
Plaintiffs,
against
The Metropolitan Surety Com-
pany,
Defendant,

County Clerk's Index
Number 26-282, Year
1911.

The summons and complaint in this action having been duly served on the defendant, and the defendant having duly appeared by David McClure, as its attorney, and having served its answer herein, from which answer it appears that the plaintiffs are entitled to a judgment dissolving the defendant and for the relief prayed for in the complaint herein; and an order having been made and

Complaint—Exhibit "A"

entered herein in the office of the Clerk of Albany County on January 6, 1909, appointing John F. Yawger temporary receiver of the defendant and enjoining the defendant, its directors, officers and managers, from exercising any of the corporate franchise, powers, rights or privileges of the defendant, and from collecting or receiving any debt or demand to or held by the defendant, and from paying out or in any way transferring or delivering to any person any of the deposits, moneys, securities, property or effects of said defendant, or held by it during the pendency of this action, and ordering that the defendant show cause at this time and place why such receiver and injunction should not be made permanent; and the said temporary receiver having duly qualified:

Now, on reading the aforesaid summons and complaint, order to show cause, affidavits of Otto Kelsey and Edward R. O'Malley herein, verified January 5, 1909, heretofore filed, and reading and filing the answer, and after hearing Edward R. O'Malley, Attorney General of the State of New York, in support of this motion, and David McClure for the defendant, not opposing, and further notice of this application for this judgment being waived in open court:

Now, on motion of Edward R. O'Malley, Attorney-General of the State of New York, attorney for the plaintiffs herein, it is hereby

Adjudged and decreed, that the defendant, The Metropolitan Surety Company be, and the same is, hereby dissolved and its corporate rights, privileges and franchises forfeited, and that a fair and just distribution of the property thereof, and of the proceeds thereof, among its stockholders and its fair and honest creditors, in the order and in the proportion prescribed by law, be had; and it is further

Adjudged and decreed, that the defendant, The Metropolitan Surety Company, its trustees, directors, managers and other officers, attorneys and agents, be, and each of them hereby is, forever restrained and enjoined from exer-

Complaint—Exhibit "A"

cising any of the corporate franchises, powers, rights or privileges of the defendant and from collecting or receiving any debts, or demands, belonging to or held by the defendant, and from paying out, or in any manner interfering with, transferring or delivering to any person, any of the deposits, moneys, securities, property or effects of said defendant, or held by it; and it is further:

Adjudged and decreed, that John F. Yawger, of New York, in the State of New York, be and he hereby is, continued as receiver of all the property and effects, real and personal, of the said corporation, The Metropolitan Surety Company, and of all the property, real, personal and mixed, seized, possessed and held by it, of whatsoever kind and wheresoever situate, either in this State or in any other State or States, including all property of any kind in which said corporation has or may have any interest, and he is hereby appointed permanent receiver of the said The Metropolitan Company, and of all its property and assets of every kind, nature and description, whether the same is situated in this State or elsewhere, with the usual powers and duties enjoyed and exercised by receivers, according to the practice of this Court and of the statutes in such case made and provided; and that the bond heretofore executed and delivered to The People of the State of New York, constituting an agreement or undertaking of the American Surety Company, given by said surety company for and on behalf of John F. Yawger, as such temporary receiver, so conditioned as that the said bond shall continue in force and effect until the final discharge of the said John F. Yawger as receiver, including any liabilities which may be incurred by said John F. Yawger by virtue of his appointment as receiver, be continued as provided by law, and the said John F. Yawger, as such permanent receiver, is authorized and directed to sequester, take and retain possession of the property, things in action and effects, real and personal, of the defendant herein, and to take and hold all property held by or in

Complaint—Exhibit "A"

possession of said defendant corporation or by him as temporary receiver thereof; and it is further

Adjudged and decreed, that the said John F. Yawger as such permanent receiver, continue to proceed to recover by process of law, or otherwise, any sum or sums of money which may be due to said corporation; and full power is hereby conferred upon the said receiver to institute and maintain actions and suits at law in any court or courts having competent jurisdiction for the collection of debts due to the defendant and the enforcement of any rights relating to the said corporation, its property and assets; and it is further

Adjudged and decreed, that all moneys of said defendant not needed for immediate disbursements be deposited in one or more of the following trust companies in the City of New York: Title Guarantee & Trust Company, Van Norden Trust Company, Broadway Trust Company, Morton Trust Company and Fidelity Trust Company, such amount at any time in each as said receiver may deem best to be held by such trust companies subject to the order of the permanent receiver in this action; the said moneys so deposited with such trust companies, as aforesaid, not to be delivered over by them except subject to, and in pursuance of the orders of this Court heretofore granted or hereafter to be granted; but said receiver may at any time, in his discretion, and without further order of the Court, transfer any or all of such moneys so to be deposited in any one of said trust companies, by check to the order of one or more of the other of said trust companies; and it is further

Adjudged and decreed, that no application shall hereafter be made to any Court, nor shall any action of the Court be asked or suffered by said permanent receiver, as to the funds and assets of the defendant above named or their transfer, sale or delivery, unless due notice of such application be first given to the Attorney-General of the State of New York, as required by law; and copies of all

Complaint—Exhibit "B"

orders made or procured shall be immediately served on the Attorney-General, as required by law; and it is further adjudged and decreed, that such further application may be made to this Court as the receiver may be advised is proper and necessary for the management and conduct of his trust; and it is further

Adjudged and decreed, that all persons whosoever, and especially creditors of said defendant, be enjoined and restrained from commencing any action or proceeding against said defendant or against said permanent receiver, or from taking any further proceedings in any action or proceeding already commenced, without first obtaining leave of this Court to bring such action or proceeding, except in cases where leave of this Court has heretofore been obtained, permitting actions or proceedings against the temporary receiver herein.

Enter,
JOHN FRANNEY,
Clerk.

GEORGE H. FITTS, Justice Supreme Court.

EXHIBIT "B"

KNOW ALL MEN BY THESE PRESENTS, That Louis Grisko of the Town of Cicero, County of Cook and State of Illinois, as principal, and American Surety Company of New York, a corporation duly authorized to transact business in the State of Illinois, as surety, are held and firmly bound unto the Town of Cicero, County of Cook and State of Illinois, in the penal sum of One Hundred Thousand Dollars (\$100,000.00) for the payment of which, well and truly to be made, the above-named obligors hereby bind themselves and their respective heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and executed this 25th day of April, 1905.

THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas, the above bounded Louis Grisko was, on the 4th

Complaint—Exhibit "B"

day of April, duly elected to the office of Supervisor of said Town of Cicero, in the County of Cook, aforesaid, for the period of one year.

NOW, THEREFORE, if the said Louis Grisko shall faithfully account for all moneys that may come into his hands, as such Supervisor, and pay over the same pursuant to the provisions of law or the order or resolution of the Board of Trustees of the Town of Cicero, and shall faithfully perform the duties of his office to the best of his skill and abilities, then this obligation to be void, otherwise to remain in full force and effect.

LOUIS GRISKO (seal).

AMERICAN SURETY COMPANY OF NEW YORK,

(A. S. C.)

By DANIEL T. HUNT,

Resident Vice President.

Attest: FREDERIC F. NORCROSS,

Resident Asst. Secretary.

I do solemnly swear that I will well and faithfully discharge my duties as Supervisor of the Town of Cicero, Cook County, Illinois, as required by law, to the best of my knowledge and abilities.

LOUIS GRISKO.

Subscribed and sworn to before me this 25th day of April, A. D. 1905.

FRANCES E. FLAGLER,

[Seal.]

Notary Public.

State of Illinois, }
County of Cook, } ss.

I, Caroline Denninger, a notary public in and for said County and State, do hereby certify that Louis Grisko, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered said instrument as his free and voluntary act for the uses and purposes therein set forth.

Complaint—Exhibit "B"

Given under my hand and notarial seal this 25th day of April, A. D. 1905.

CAROLINE DENNINGER,
Notary Public.

State of Illinois, }
County of Cook, } ss.

On this 25th day of April, 1905, before me personally appeared Daniel T. Hunt, Resident Vice President at Chicago, Illinois, of the American Surety Company of New York, to me known, who being by me duly sworn did depose and say, that he resided in the City of Chicago, Illinois; that he is Resident Vice President of said American Surety Company of New York, the corporation described in and which executed the instrument to which this affidavit is attached; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. That said American Surety Company of New York has complied with the statutes of the State of Illinois, enabling corporations created for that purpose to transact surety business in the State of Illinois, and that the Superintendent of Insurance of the State of Illinois has issued his certificate setting forth that said American Surety Company of New York has so qualified and is now authorized to transact surety business in the State of Illinois.

That he was acquainted with Frederic F. Norcross and knew him to be one of the Resident Assistant Secretaries of said corporation in the City of Chicago, and that the signature of said Frederic F. Norcross subscribed to said instrument is in the genuine handwriting of said Frederic F. Norcross and was thereto subscribed by authority of the Board of Directors of said corporation, and in the presence of him, the said Daniel T. Hunt, Resident Vice President. CAROLINE DENNINGER,
Notary Public,
Cook County, Illinois.

Complaint—Exhibit "C"

EXHIBIT "C"

KNOW ALL MEN BY THESE PRESENTS, That Louis Grisko of the Town of Cicero, County of Cook and State of Illinois, as principal, and The Metropolitan Surety Company, of New York, a corporation duly authorized to transact business in the State of Illinois, as surety, are held and firmly bound unto the Town of Cicero, County of Cook, and State of Illinois, in the penal sum of One Hundred Thousand Dollars (\$100,000) for the payment of which, well and truly to be made, the above-named obligors hereby bind themselves and their respective heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and executed this Sixteenth day of April, 1906.

THE CONDITION OF THIS OBLIGATION IS SUCH, That Whereas, the above bounden Louis Grisko was, on the 4th day of April, A. D. 1906, duly elected to the office of Supervisor of said Town of Cicero, in the County of Cook, aforesaid, for the period of one year.

Now, **THEREFORE,** if the said Louis Grisko shall faithfully account for all moneys, that may come into his hands, as such Supervisor, and pay over the same pursuant to the provisions of law or the order or resolution of the Board of Trustees of the Town of Cicero, and shall faithfully perform the duties of his office to the best of his skill and ability, then this obligation to be void, otherwise to remain in full force and effect.

LOUIS GRISKO,

THE METROPOLITAN SURETY COMPANY,

Charles Y. Freeman,

Resident Vice President.

Walter Faraday,

Resident Assistant Secretary.

(Metropolitan Surety Company seal.)

I do solemnly swear that I will well and faithfully

Complaint—Exhibit "C"

discharge my duties as Supervisor of the Town of Cicero, Cook County, Illinois, as required by law, to the best of my knowledge and abilities.

LOUIS GRISKO.

Subscribed and sworn to before me this 17th day of April A. D. 1906.

FRANCES E. FLAGLER,
Notary Public.

State of Illinois, }
County of Cook, } ss.

I, FRANCES E. FLAGLER, a notary public in and for said County and State, do hereby certify that Louis Grisko, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 17th day of April, A. D. 1906.

FRANCES E. FLAGLER,
Notary Public.

State of Illinois, }
County of Cook, } ss.

On this sixteenth day of April A. D. 1906, before me personally appeared Charles Y. Freeman, Resident Vice President at Chicago, Illinois, of the Metropolitan Surety Company, to me known, who being by me duly sworn, did depose and say, that he resides in the City of Chicago, Illinois; that he is Resident Vice President of said The Metropolitan Surety Company, the corporation described in and which executed the instrument to which this affidavit is attached; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

That said The Metropolitan Surety Company, has complied with the statutes of the State of Illinois, enabling

Statement of the Case

corporations created for that purpose to transact surety business in the State of Illinois and that the Superintendent of Insurance of the State of Illinois has issued his certificate setting forth that said The Metropolitan Surety Company has so qualified and is now authorized to transact surety business in the State of Illinois.

That he was acquainted with Walter Faraday and knew him to be one of the Resident Assistant Secretaries of said corporation in the City of Chicago, and that the signature of said Walter Faraday subscribed to said instrument is in the genuine handwriting of said Walter Faraday and was thereto subscribed by authority of the Board of Directors of said corporation, and in the presence of him, the said Charles Y. Freeman, Resident Vice President.

LORETTA G. HORNE,
Notary Public,
Cook County, Illinois.

[Notarial seal.]

JAMES C. FARGO, as President of the American Express Company, Respondent, v. AMERICAN BONDING COMPANY, OF BALTIMORE, MARYLAND, Appellant.¹

(207 N. Y. 664; aff'g without opinion 145 App. Div. 917; 130 Supp. 1110, no opinion)

Principal and surety; bond given by defendant to the plaintiff to indemnify the plaintiff against any damages which it might suffer by giving a bond for the payment of customs duties to the French Government to permit the entry of circus property, without payment of duties, on the agreement to take the property out of the country within six months

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 17th, 1911, affirming a judgment in favor

¹ No reported opinion was written in this case. Mr. Justice HENDRICK, at Trial Term, wrote an opinion which is not elsewhere pub-

 Complaint

of the plaintiff entered upon a decision of the court at Trial Term, without a jury.

Delavan A. Holmes and *Oliver C. Carpenter* for the appellant.

Edmund L. Baylies, *Joseph W. Welsh* and *Edwin D. Bechtel* for the respondent.

Judgment affirmed with costs, no opinion.

CULLEN, Ch. J., WERNER, WILLARD BARTLETT, HISCOCK, COLLIN, JJ., concurred; GRAY and CHASE, JJ., not sitting.

 Form No. 17

Complaint; Indemnity; Action on Bond Given by the Defendant to Indemnify the Plaintiff against any Sums the Plaintiff might be Called upon to Pay by Reason of Furnishing a Bond to the French Government to pay Customs Duties on Property of a Circus should the Circus Property not be taken without the Country within Six Months¹

Supreme Court, New York County.

James C. Fargo, as President
of the American Express
Company,

Plaintiff,

against

American Bonding Company
of Baltimore,

Defendant.

The plaintiff, by Carter, Ledyard & Milbourn, his attorneys, for his amended complaint herein, alleges:

lished and will be found, *post*, p. 215. For complaint from this case see above.

See *Yawger v. Metropolitan Surety Co.*, *ante*, page 179, and notes to that case for reference to other complaints against sureties.

¹ From *Fargo v. American Bonding Co.*, 207 N. Y. 664; *aff'g* without

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FOR A FIRST CAUSE OF ACTION

I. That the American Express Company is an unincorporated association of more than seven persons, organized in the State of New York, wherein it has at all times maintained its principal office. That James C. Fargo is the president of said American Express Company, and

opinion 145 App. Div. 917; 130 Supp. 1110, no opinion. See *ante*, page 213. The only opinion written in this case was that of Mr. Justice HENDRICK at Trial Term. It is not elsewhere reported and the following is the opinion in full:

HENDRICK, J.:

Defendant executed and delivered to plaintiff a bond reciting that the J. T. McCaddon Company had applied to plaintiff to furnish a bond with a condition that all dutiable goods taken by that company into France will either be taken out again or the duty paid. The bond then proceeded as follows: "Now, therefore, the American Bonding Company of Maryland * * * does hereby undertake that it will indemnify and hold harmless the American Express Company by reason of any bond or bonds given by it as hereinbefore set out, or by any other corporation, individual or copartnership, whereby the American Express Company assumes any risk." The McCaddon Company thereafter took dutiable goods into France. They were neither taken out again nor were the duties paid. Plaintiff procured certain bonds to be given for the purpose of enabling said goods to be entered, and has paid the duties and certain expenses connected therewith. Plaintiff thereupon requested reimbursement to the end that it might be indemnified and held harmless, which defendant has refused. One objection made by defendant is that the goods were not entered in the name of the McCaddon Company. This is urged as a variance from the strict terms of the bond, and many cases are cited to the effect that when a surety undertakes to answer for the conduct of a third person he is released by any change in conditions. Taking one of the cases at random: A undertook that B should take skins and deliver them to C. Subsequently, without A's consent, D was substituted for C as consignee. That change did not affect the risk, but it released A from his obligation. The case at bar does not belong to that class. Defendant did not undertake to answer for the conduct of any third person. It promised plaintiff indemnity for its own acts. Its obligation was direct and primary. As soon as plaintiff became damnified by furnishing the bond in France and paying the sums stipulated a cause

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as such is the plaintiff herein, and that the said James C. Fargo is a citizen of the State of New York.

II. That the defendant is a corporation organized, existing and carrying on its business under and by virtue of the laws of the State of Maryland, and that it maintains

of action accrued for indemnity. The contract of an indemnitor differs from that of a surety in important respects. A is or will be under obligation to B. C promises B that the obligation shall be performed. In an action to enforce this promise B is the plaintiff. Again, A is or will be under obligation to B. C promises A that he shall suffer no detriment on account of that obligation. In an action to enforce this promise A is the plaintiff. Where one party is liable over to another by operation of law a judgment against the latter is conclusive in several respects against the former who has been "vouched in." *Mayor v. Brady*, 151 N. Y. 611. The same result may be reached by contract. In all other cases the principal and surety are so separated in law that a judgment against one has no effect upon the other. The law looks upon the surety as an unfortunate to be specially guarded, so that if any change is made in the relations of the parties without his consent he is released, although the change may be to his advantage. But the contract of an indemnitor is to be construed and enforced like any other contract. It affects not the conduct of a third party, but the rights of the indemnitee alone. "If you will sign a bond, I will see that you are not sued thereon or put to any expense." What some other person may do is of no relevancy to the promise thus made by the indemnitor. The question at issue lies between the two parties alone. If the thing indemnified against comes to pass, the indemnitor must immediately respond. Where the thing indemnified against is a judgment or an action, the indemnitor must pay as soon as the condition of the bond is broken. In all cases of general indemnity the judgment against the indemnitee is conclusive against the indemnitor, if he had notice of the pendency of the action, however informed. *Greenleaf on Evidence*, §§ 188, 523, 535; *Washington Gaslight Co. v. D.C.*, 161 U. S. 316; *Oceanic Steam Navigation Co. v. Campania Transatlantica Espanola*, 144 N. Y. 663; *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275. Some concessions as to facts were made at the trial, which appear to have been capable of easy proof. These, in connection with the evidence, render it quite certain that the circus property which passed into the hands of the French liquidator in bankruptcy was the property of the McCaddon Company referred to in the bond. The objection, therefore, taken by defendant that the property passed through the French custom house in the name of McCaddon instead of in the name of the

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an office for the transaction of its business in the City and County of New York.

III. That the said defendant, by its proper officers and agents, who were duly authorized to act for the defendant in the premises, on or about the 4th day of April, 1905, in the City and State of New York, executed and delivered to the American Express Company a certain bond, whereby the defendant undertook to indemnify and hold harmless the American Express Company, by reason of any bond given by the American Express Company or by any other corporation, individual or co-partnership, acting on its behalf, whereby it assumed any risk, to the French Government to provide, in compliance with the custom laws of France, that all dutiable goods taken into France by the J. T. McCaddon Company

McCaddon Company seems to be quite immaterial. The plain purpose of the bond was to secure entry of the circus property into France practically in bond. Whether, therefore, it passed the customs in one name or in another and whether the bond given to the customs officers accurately described it or not cannot effect a variance of defendant's undertaking. Defendant suggests that the phrase "as hereinbefore set out," as used in the operative part of the bond refers to the form of the bond to be given by plaintiff in France. I do not so read it. The recitals refer to the object of the bond to be given in France and not to the form of it. Nor do I find any merit in the objection that the French Government seized the property on the bankruptcy of the circus instead of waiting six months, as originally contemplated. Defendant's contract was one of indemnity. No reference was made to the length of time to elapse before the duties should be paid or the goods withdrawn from France. Plaintiff was to be held "harmless" and indemnified against any bond whereby plaintiff "assumes any risk." It did assume risk and is entitled to be held harmless. That, I think, entitles plaintiff to reimbursement for all expenses fairly incurred in the performance of its contract. But did the parties contemplate payment for services? I think not. Indemnity against the risks incurred by giving a bond seems to me to be limited to the payments actually made and to be made. The compensation paid to plaintiff for its services may in this particular case be inadequate, but I do not think that defendant undertook to pay for them. The claim for \$1,000, therefore, must be disallowed. Let findings be submitted on notice.

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should be taken out again, in compliance with the laws of France, or that duty should be paid thereon. A copy of this bond is hereunto annexed, marked Exhibit "A," and made a part hereof, as though fully set forth herein.

IV. That the American Express Company, thereafter and pursuant to its agreement with the defendant, entered into an agreement with the Credit Lyonnais, of Lyons, France, wherein and whereby the Credit Lyonnais undertook and agreed to furnish, for the American Express Company, a bond to the French Government on behalf of the J. T. McCaddon Company, for the purpose of complying with the custom laws of France, which bond was to provide that all dutiable goods taken into France by the said J. T. McCaddon Company would be taken out again in compliance with the laws of France, or that duty would be paid thereon and wherein and whereby the said American Express Company undertook and agreed to indemnify and hold harmless the said Credit Lyonnais for any and all loss sustained by it, by reason of the bond to be given by it to the French Government as aforesaid.

V. That thereafter and on or about the 20th day of April, 1905, the said Credit Lyonnais at the instance and request of the American Express Company and pursuant to its said agreement with the said express company, furnished to the French Government a bond on behalf of the said J. T. McCaddon Company which bond provided that all dutiable goods taken into France would be taken out again in compliance with the laws of France, or that the duty imposed by the said government would be paid thereon, which said bond was that provided and contracted for in Exhibit "A," hereunto attached.

VI. That the said J. T. McCaddon Company, by virtue of the bond given by the Credit Lyonnais to the French Government was permitted to, and did, import into France certain dutiable goods without the payment or exaction of any duty thereon, and that the said company, at Grenoble,

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France, was subsequently judicially declared a bankrupt on or about the 7th day of August, 1905, and that by the laws of France, the duty on the said property imported into France by the J. T. McCaddon Company and covered by the bond given by the Credit Lyonnais to the French Government, as aforesaid, became due and owing to the said government when the said J. T. McCaddon Company was judicially declared a bankrupt.

VII. That the Credit Lyonnais on or about the 29th day of August, 1905, was forced and constrained by virtue of a judicial summons issued against it by the French Government to pay to the French Government the sum of Nine thousand three hundred and sixty and $\frac{9}{100}$ Dollars (\$9,360.09). That the said Nine thousand three hundred and sixty $\frac{9}{100}$ dollars was the amount due and owing to the said Government by the said Credit Lyonnais as the duty on the goods and property imported into France by the said J. T. McCaddon Company and was exacted from said the Credit Lyonnais under and by virtue of the bond given by it to the French Government as aforesaid.

VIII. That the American Express Company under and by virtue of the terms of its contract and agreement with the said Credit Lyonnais, which agreement was entered into for the purposes of fulfilling the obligations of the said Express Company to the defendant herein under the bond hereunto attached as Exhibit "A," was forced and compelled to indemnify and reimburse the said Credit Lyonnais on account of its aforesaid payment to the French Government, and that thereafter and on or about the 29th day of August, 1905, the American Express Company paid to the said Credit Lyonnais the sum of Nine thousand three hundred and sixty $\frac{9}{100}$ dollars (\$9,360.09); that being the amount exacted from the said Credit Lyonnais by the French Government as aforesaid.

IX. That thereafter and at divers times the American

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Express Company, upon due notice to, and at the suggestion and request of, and to secure for the defendant its proportionate share of the estate of the said bankrupt, and to protect the rights and interests of the defendant and to the said bankrupt's estate, expended divers sums of money on behalf of the said defendant, to wit:

On or about August 29, 1905.....	\$ 10.94
On or about September 11, 1905...	27.75
On or about October 21, 1905.....	23.45
On or about December 6, 1905.....	36.00
On or about October 25, 1906.....	243.90
On or about April , 1907.....	244.80

amounting in all to the sum of Five hundred and seventy-nine and eighty-four one-hundredths dollars (\$579.84)

X. That the plaintiff has made repeated demands on the defendant for repayment of the aforesaid total expenditure, to wit, Nine thousand nine hundred and thirty-nine and ⁹³/₁₀₀ dollars (\$9,939.93), and that the defendant has at all times failed, neglected and refused to pay the same.

FOR A SECOND CAUSE OF ACTION

XI. The plaintiff repeats and realleges as a part of this cause of action all of the allegations contained in Paragraphs I to IX in this complaint contained, and makes them a part hereof as though fully set forth herein.

XII. The plaintiff further alleges that the American Express Company, after the J. T. McCaddon Company had been declared a bankrupt, undertook at the instance and request of the defendant, to take whatever steps might be necessary to protect the rights and interests of the defendant in and to the estate of the said bankrupt and to secure for the defendant its proportionate share of the estate of the said bankrupt, and that the said express company to perform its said agreement, procured the presentation to the Official Liquidator of the said bank-

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rupt's estate of a claim against the said estate for the amount of the customs paid by the Credit Lyonnais as aforesaid and pressed the said claim, together with the claim for a preference therefor in an action in the Grenoble Tribunal, and in so doing expended the following sums of money on behalf of and for the account of the defendant:

On or about August 29, 1905.	\$ 10.94
On or about September 11, 1905.	20.75
On or about October 21, 1905.	23.45
On or about December 6, 1905.	36.00
On or about October 25, 1906.	243.90
On or about April , 1907.	244.80

amounting in all to the sum of Five hundred and seventy-nine and eighty-four one-hundredths dollars (\$579.84).

XIII. That the plaintiff has made repeated demands on the defendant for repayment of the said sum of Five hundred and seventy-nine and $\frac{84}{100}$ dollars, and that the defendant has at all times failed, neglected and refused to pay to the plaintiff that sum, or any part thereof.

FOR A THIRD CAUSE OF ACTION

XIV. The plaintiff repeats and realleges as a part of this cause of action, all the allegations contained in Paragraphs I to X of the first cause of action in the complaint contained, and makes them a part hereof as though fully set forth herein.

XV. He further alleges that thereafter and at divers times the plaintiff upon due notice to, and at the request of the defendant, and to secure for the defendant its proportionate share of the said bankrupt's estate and to protect the rights and interests of the defendant in and to the said estate, rendered certain services to and on behalf of the defendant of the fair and reasonable value of One thousand dollars; that the said services consisted in the presentation by the plaintiff on behalf of the defendant to the Official

Complaint

Liquidator of the said bankrupt's estate of a claim against the said estate for the customs paid by the Credit Lyonnais as the agent of the plaintiff, to the French Government as hereinbefore set forth; in the prosecution of the said claim and the demand for a preference therefor in an action in the Grenoble Tribunal, to wit, Suit of the Workmen and Employés of McCaddon's Circus, against Credit Lyonnais and Gabriel Barrett, American Express Company and the American Bonding Company; and in retaining, employing and consulting with the attorneys for and with regard to the said action, all of which services were performed by or under the supervision of W. S. Daliba, European Manager of the American Express Company; and the services of the plaintiff in the City of New York, including divers conferences with the defendant and the plaintiff's attorneys in the said City of New York.

XVI. That the plaintiff, on or about the 27th day of May, 1907, demanded payment of the said sum of \$1,000, in addition to the amounts set forth in the First and Second Causes of Action herein contained, and the defendant has at all times refused and neglected to pay the same.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of Ten thousand nine hundred and thirty-nine ⁹³/₁₀₀ dollars (\$10,939.93), with interest on Nine thousand three hundred and sixty and ⁹/₁₀₀ dollars (\$9,360.09) from the 29th day of August, 1905, and on the divers items set forth in the Ninth Paragraph of this complaint from the date of their respective payments as set forth in the said Ninth Paragraph, and on One thousand dollars (\$1,000) from the 27th day of May, 1907, together with the costs and disbursements of this action.

CARTER, LEDYARD & MILBURN

Attorneys for Plaintiff,

54 Wall Street,
New York City.

[Verification.]

Complaint—Exhibit "A"

EXHIBIT "A"

WHEREAS, J. T. McCADDON COMPANY, a corporation organized and existing under and by virtue of the laws of the State of New York, has applied to the American Express Company to furnish for it a certain bond in the maximum sum of Twenty thousand dollars (\$20,000), which said bond is to be given by the American Express Company to the French Government, or by some Banking or Financial Institution at the request of the American Express Company; and

WHEREAS, the said bond is for the purpose of complying with the customs laws of the Government of France, and to provide that all dutiable goods taken by the J. T. McCaddon Company into France, will be taken out again in compliance with the laws of France, or that duty will be paid thereon; and

WHEREAS, said bond may be renewed from time to time, or new bonds given in the place thereof;

Now, THEREFORE, the American Bonding Company of Baltimore, a corporation organized under the laws of the State of Maryland, lawfully transacting business in the State of New York, and having an office at No. 32 Nassau Street, in the City of New York, does hereby undertake that it will indemnify and hold harmless the American Express Company by reason of any bond or bonds, given by it as hereinbefore set out, or by any other corporation, individual, or copartnership, whereby the American Express Company assumes any risk;

PROVIDED, that the total liability of the American Bonding Company of Baltimore hereunder shall not exceed the total sum of Twenty thousand dollars (\$20,000) at any one time, and

FURTHER PROVIDED, that the American Bonding Company of Baltimore shall not be holden to the American Express Company for any risk assumed and undertaken after the fourth day of April, 1908, by the American Express Company.

Statement of the Case

IT IS UNDERSTOOD AND AGREED that any loss sustained by the American Express Company accruing after the fourth day of April, 1908, upon any risk assumed by it on or before the said fourth day of April, 1908, is covered by this undertaking.

Dated, New York, April 4th, 1905.

AMERICAN BONDING COMPANY OF BALTIMORE

Attest:

By Hulbert T. E. Beardsley,
Resident Vice President.

(Seal.)

Paul W. Arnold,
Resident Assistant Secretary.

WILSON F. WAKEFIELD, Respondent, v. PHILIP B. GAYNOR, Defendant, and EDWARD V. BROPHY et al., as Trustees of the Village of Port Chester, Appellants.¹

(207 N. Y. 772; aff'g without opinion 144 App. Div. 905; 128 Supp. 1149; aff'g sub nom., *Wakefield v. Brophy*, 67 Misc. 298; 122 Supp. 632; same case on motion to continue temporary injunction, *Wakefield v. Perkins*, 65 Misc. 619; 120 Supp. 635. Motion to dismiss appeal from 144 App. Div. 905, denied in 203 N. Y. 545).

Municipal corporations; taxpayers' action; injunction; restraining payment for work done for municipality under an unauthorized contract

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered

¹ For the following papers from this case see the pages indicated: complaint, *post*, page 226; findings, *post*, page 235; judgment, *post*, page 241.

For complaint in taxpayers' action to prevent expenditure of public money to improve streets in residential park established in village,

Statement of the Case

May 8, 1911, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Arthur I. Strang, Clinton T. Taylor and William A. Sawyer, for appellants.

Frederick W. Sherman for respondent.

Judgment affirmed; with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, WERNER, WILLARD BARTLETT, CHASE, COLLIN and HOGAN, JJ.

from *Smith v. Smythe*, 197 N. Y. 457, see BRADBURY'S RULES OF PL., page 1010.

For complaint in a taxpayers' action to annul a lease of marsh lands, from *Wenk v. City of N. Y.*, 171 N. Y. 607, see 2 BRADBURY'S FORMS OF PL. 1354.

For complaint in taxpayers' action for an injunction against taking land for a water supply which land was alleged to be unavailable for that purpose, from *Queens County Water Co. v. Monroe*, 83 App. Div. 105; 82 Supp. 610; see 2 BRADBURY'S FORMS OF PL. 1368.

For complaint in taxpayers' action to prevent letting of contract for bridge under proposals alleged to be preferential, from *Gage v. City of N. Y.*, 110 App. Div. 403; 97 Supp. 157, see 2 BRADBURY'S FORMS OF PL. 1374.

For complaint in taxpayers' action to prevent waste in securing water supply, from *Simson v. Parker*, 190 N. Y. 19, see 2 BRADBURY'S FORMS OF PL. 1380.

Complaint

Form No. 18

Complaint; Municipal Corporation; Taxpayer's Action; Injunction;
Restraining Payment for Work Done for Municipality under
Unauthorized Contract ¹

Supreme Court, County of Westchester.

Wilson F. Wakefield,
Plaintiff,
against
Philip B. Gaynor, Franklin P.
Perkins, as President, and
Edward V. Brophy, Henry
Dehmer, Louis C. Wenken-
bach, Sylvester O. Smith
and Charles O. Frederick as
Trustees of the Village of
Port Chester, New York;
Thomas F. J. Connolly as
Clerk of said Village, and
Thomas F. Connolly as
Treasurer of said Village,
Defendants.

The plaintiff, by Frederick W. Sherman, his attorney, complains of the defendants above named and each of them, and respectfully shows to the court:

FIRST: That the plaintiff now is, and was at all times hereinafter mentioned, a resident of and the owner of

¹ From *Wakefield v. Gaynor*, 207 N. Y. 772; aff'g without opinion 144 App. Div. 905; 128 Supp. 1149; aff'g sub nom., *Wakefield v. Brophy*, 67 Misc. 298; 122 Supp. 632; same case on motion to continue temporary injunction, *Wakefield v. Perkins*, 65 Misc. 619; 120 Supp. 635; motion to dismiss appeal from 144 App. Div. 905, denied in 203 N. Y. 545. See *ante*, page 224. For findings, see *post*, page 235; for judgment, see *post*, page 241.

Complaint

real estate situated and assessed in the Village of Port Chester, New York, and that the sum of his assessment amounts to one thousand dollars.

That he is liable to pay taxes upon said assessment in said Village and has been assessed therein in the sum of one thousand dollars, within one year previous to the commencement of this action.

SECOND: That the said Village of Port Chester is a domestic municipal corporation, and the said Franklin P. Perkins is and for the year last past has been an officer; to wit: The President of said Village.

THIRD: That since the 4th day of May, 1909, the said defendants, Edward V. Brophy, Henry Dehmer, Louis C. Wenkenbach, Sylvester O. Smith and Charles O. Frederick have been and are officers, to wit: Trustees of said Village and members of its Board of Trustees, and there is and since has been but one other member of said Board; and the defendant, Thomas F. J. Connolly, has been and is Clerk of said Village and of its said Board of Trustees, and the defendant, Thomas F. Connolly, Treasurer of said Village, and each are officers thereof, and said officers have control and management of the finances of said Village.

FOURTH: That on or about the 18th day of June, 1909, a communication in writing from the defendant Philip B. Gaynor, directed to the Board of Trustees of the Village of Port Chester, New York, was read at a regular meeting of the said Trustees, and at which meeting the defendant Village President Franklin P. Perkins presided, and all of said defendant Trustees were present, wherein the said Gaynor offered to make an audit of the receipts of taxes and assessments of said Village and calculate the interest upon certain unpaid taxes and assessments due said Village, and prepare certain books and devise and install an accounting system for the aggregate sum of six thousand five hundred and fifty dollars (\$6,550), and thereupon at said meeting a resolution was offered by the

Complaint

defendant Edward V. Brophy, and seconded by the defendant Charles O. Frederick, that the said bid of Philip B. Gaynor as per items in the said proposal submitted by him to the Board, with some specified modifications, be accepted at the price of six thousand dollars (\$6,000), and that the President be and was authorized to enter into a contract with Philip B. Gaynor for the performance of the said work at such price.

FIFTH: That all the said defendant Trustees then and there voted in favor of the said resolution, and the remaining member of said Board of Trustees, George S. Bailie, voted "No," on the passage of said resolution, and the said defendant Perkins declared the said resolution carried.

SIXTH: That thereupon and on or about the 28th day of June, 1909, pursuant to said resolution, the defendant Perkins, assuming and attempting to act by and on behalf of and to bind the Village of Port Chester, affixed the seal and signed the name of said Village and his own name as President in duplicate to a paper writing, a copy of which is hereto annexed, marked Schedule "A," and reference to said schedule is hereby made of the same to be deemed taken as a part of this complaint as is herein fully set forth at length.

SEVENTH: That the defendant Gaynor is about to present a claim under the terms of said paper writing marked Schedule "A," to the Village of Port Chester for the payment to him of six thousand dollars.

EIGHTH: That the defendant Trustees are about to audit the said claim and to direct the defendant Clerk to draw upon the Treasurer a warrant for the payment thereof, and the defendant Treasurer thereupon will then, unless restrained, as the plaintiff is advised and verily believes, draw and deliver to said Gaynor a draft upon the funds of the Village of Port Chester for said sum of six thousand dollars.

NINTH: That neither upon the 18th day of June, 1909,

Complaint

when the said resolution was passed by said Trustees, nor upon the 28th day of June, 1909, when the said contract, Schedule "A," was signed by the said defendant Perkins as aforesaid, was the money for the payment of the said sum of six thousand dollars therein and thereby provided to be paid, or any part thereof, on hand, nor were there any funds lawfully applicable to such payment in the treasury of the Village, and never has any proposition been adopted by the electors of the Village of Port Chester or otherwise authorizing the said Board of Trustees to raise for such purpose such money or any part thereof, and therefore the execution of said contract was unauthorized by law and in direct disobedience to the statute in such case made and provided.

TENTH: That the receipts of taxes and assessments from May 1st, 1909, as well as for the year prior thereto and since the founding of said Village, have been regularly audited as required by law by the officials for the purpose designated by statute, and there was and is no lawful authority or power existing in the Board of Trustees of the Village of Port Chester to re-audit the same or to employ any person so to do, nor has any person not being an official of said Village any power or authority to make such audit, and neither in the month of June, 1909, nor at any time since, was there any necessity for the employment of the defendant Gaynor or any person outside the regular Village officials for the preparation of an abstract of the arrears of taxes and assessments; but on the other hand there was in the custody of the defendants, the property of the said Village, a list of the arrears of taxes and assessments showing all such arrears, and the cost and preparation of the same, as plaintiff is informed and believes, was but three hundred dollars, being the reasonable value of any such list.

ELEVENTH: That then and there, there existed no necessity for the computation of interest upon said arrears; for that it was not necessary to compute the same until

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a sale had been had, or the arrears were about to be paid, nor could it be known what would be the full amount of interest until such time, and the computation thereof at that time was a part of the official duty of the official conducting the sale or receiving such payment; and the preparation of the books mentioned in "Item II" of the said paper writing marked Schedule "A" was unnecessary, wasteful, unauthorized and of no practical use or value to the Village of Port Chester, or its officials, and when completed would have lacked all official character and would have been but a duplication of the entries in the original records of the Village.

TWELFTH: That the preparation of the books mentioned in "Item III" of the said paper writing, marked Schedule "A," would have been of no value or use to the Village of Port Chester or its officials, for that it was to contain the audited figures obtained as a result of the audit by the said Gaynor, which as aforesaid was an illegal and unofficial audit and altogether void as such, and the payment of the funds of the said Village of Port Chester for the said services and audit of the books would have been a waste of the funds of the said Village, and the making and signing of the said paper writing, Schedule "A," were illegal official acts on the part of the defendants, and the payment of the said sum of six thousand dollars or any part thereof, or any acts tending toward or in aid of said payment would be illegal official acts, and the claim for said funds is an illegal claim and demand.

WHEREFORE, this plaintiff prays judgment that the defendants and each of them and the successors of said defendant officers may be restrained during the pendency of this action and permanently as officers of the Village of Port Chester from acting under or in any way ratifying or carrying out said contract, and from paying from the funds of said Village or collecting said claim of six thousand dollars or any part thereof, or from doing or suffering any act on the part of said Village towards auditing, al-

Complaint—Schedule "A"

lowing or paying said sum or any part thereof, or conniving at such auditing, allowance or payment, and for such further and other relief as to the Court shall seem just, and for the costs of this action.

FREDERICK W. SHERMAN,
Attorney for Plaintiff,
Port Chester, N. Y.

[Verification.]

SCHEDULE "A"

This Agreement made the 28th day of June, 1909, between Philip B. Gaynor, of the City of New York, County and State of New York, party of the first part, and the Village of Port Chester, a municipal corporation in the County of Westchester and State of New York, party of the second part,

WITNESSETH, that the party of the first part in consideration of the agreement hereinafter made by the party of the second part agrees to make an audit of all taxes and assessments in the Village of Port Chester, New York, abstract in book form all unpaid items; and devise and install an effective system of accounting for all of the various departments of said Village.

That said work, labor and services to be performed by the party of the first part under the terms of this agreement, which are more specifically set forth as follows:

ITEM I

The party of the first part agrees to make an audit of the receipt of all taxes and assessments from May 1st, 1896, to May 1st, 1909, a period of thirteen years; prepare an abstract in book form showing the arrears of taxes and assessments for said period, giving the complete data as shown by the records of the various departments and officers of said village; calculate and compute the amount of interest charges and penalties on each item for said period as prescribed by the Charter, showing the

Complaint—Schedule "A"

total amounts as per the records of the various departments of said Village to the present date; verify the receipts from all other sources in totals for each year and prove same against the bank deposit accounts for said Village, for the sum of four thousand five hundred dollars (\$4,500).

ITEM II

The party of the first part agrees to prepare an abstract in book form as per the records of the various departments of the Village of Port Chester of all arrears of taxes, assessments and sales for the same, prior to May 1st, 1896, beginning at the earliest obtainable date and including in said report the date of the issuance of warrants to the Receiver of Taxes for the collection of said taxes and assessments so far as the same may be disclosed by the records for the sum of three hundred dollars (\$300).

ITEM III

The party of the first part agrees to devise and install an accounting system which shall be co-ordinated in the several departments, and provide for a control of the figures through general accounts which will in effect safeguard the finances of said Village and provide a certain means of knowing the condition of the affairs of said village.

The party of the first part further agrees to set up on the new books to be installed under the new system the required accounts to set forth the conditions and operations of said Village and will instruct person or persons in charge of the various departments and supervise the said system as may be necessary until November 1st, 1909.

The party of the first part will open the said books with the audited figures obtained as a result of said audit, and further agrees after said audit has been successfully consummated to make a report to the Board of Trustees of the Village of Port Chester of the same, together with

Complaint—Schedule "A"

such other recommendations as may seem necessary and advisable.

The party of the first part will perform all of the work and services under this section designated as "Item III" for the sum of twelve hundred dollars (\$1,200).

It being understood and agreed by the parties hereto that all existing records of the Village of Port Chester shall be placed at the disposal of the party of the first part by the party of the second part, and that the Corporation Counsel of said Village will construe the sections of the Charter of said Village covering interest, charges and penalties and consult and advise the party of the first part in any matter which may arise during the pendency of the work to be performed as hereinbefore set forth.

It is further understood and agreed by and between the parties hereto that the party of the first part shall complete the whole of the work comprehended in this agreement on or before the 1st day of October, 1909.

It is further understood and agreed by the parties hereto that the party of the second part shall pay for, furnish and supply all the necessary books for the installation of said system and the performance of said work agreeable to the forms and suggestions furnished by the party of the second part.

It is further understood and agreed by and between the parties hereto that the sum total to be paid by the party of the second part to the party of the first part upon the final completion of said work, labor and services shall be the sum of six thousand dollars (\$6,000), and that the said sum shall be paid by the party of the second part to the party of the first part in current funds upon the presentation to the party of the second part of the final report of said audit as hereinbefore referred to and upon satisfactory proof to the Board of Trustees of the Village of Port Chester that the work contemplated to be done herein has been fully completed and performed by the party of the first part.

Complaint—Schedule "A"

This agreement shall bind the parties hereto, their successors and assigns.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal and the party of the second part has hereunto set its hand and official seal by its President the day and year first above written.

(Signed.) PHILIP B. GAYNOR. [L. S.]
Village of Port Chester,
FRANKLIN P. PERKINS,
President.

State of New York, }
County of Westchester, } ss:

On this 28th day of June, 1909, before me personally came Philip B. Gaynor, to me known and known to me to be the individual described in and who executed the within agreement, and he acknowledged to me that he executed the same.

WM. A. SAWYER,
Notary Public,
Westchester County, N. Y.

State of New York, }
County of Westchester, } ss:

On this 28th day of June, 1909, before me personally came Franklin P. Perkins, to me known, who, being by me duly sworn, did depose and say that he resided in Port Chester, N. Y.; that he is the President of the Village of Port Chester, N. Y., the corporation described in and who executed the foregoing instrument; that he knew the seal of such corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Trustees of the said Village of Port Chester, and that he signed his name thereto by like order.

WM. A. SAWYER,
Notary Public,
Westchester County, N. Y.

Findings

Form No. 19

**Findings; Municipal Corporation; Taxpayer's Action; Injunction;
Restraining Payment for Work done for Municipality under Un-
authorized Contract ¹**

Supreme Court, County of Westchester.

Wilson F. Wakefield,	}
Plaintiff,	
against	
Edward V. Brophy and	
others,	
Defendants.	

This case having come on for trial before the Court without a jury and the plaintiff appearing by his attorney and counsel, Frederick W. Sherman, and the defendant Gaynor having made default in appearing and pleading, and the other defendants having appeared by their attorney, William A. Sawyer, and Henry Dykeman of counsel, and the proofs and allegations of the parties having been heard and considered, and the arguments of counsel, and due deliberation had thereon,

I DO DECIDE AS MATTER OF FACT:

FIRST: That the plaintiff is and at the time of the commencement of this action was a resident and the owner of real estate situated and assessed in the Village of

¹ From *Wakefield v. Gaynor*, 207 N. Y. 772; aff'g without opinion 144 App. Div. 905; 128 Supp. 1149; aff'g sub nom., *Wakefield v. Brophy*, 67 Misc. 298; 122 Supp. 632; same case on motion to continue temporary injunction, *Wakefield v. Perkins*, 65 Misc. 619; 120 Supp. 635; motion to dismiss appeal from 144 App. Div. 905, denied in 203 N. Y. 545. See *ante*, page 224. For complaint see *ante*, page 226; for judgment, see *post*, page 241.

Findings

Port Chester, and that the sum of his assessment amounts to one thousand dollars.

That he is liable to pay taxes upon the said assessment in said Village and has been assessed therein in the sum of one thousand dollars within one year previous to the commencement of this action.

SECOND: That the Village of Port Chester is a domestic municipal corporation.

THIRD: That besides the defendants there is one other member of the Board of Trustees, but that he took no part in the making of the contract annexed to the complaint, but voted against the making of the same.

FOURTH: That the defendant Gaynor claims under the paper writing annexed to the complaint the sum of six thousand dollars from the Village of Port Chester.

FIFTH: That the defendant trustees at the commencement of this action were about to audit the claim of the defendant Gaynor above referred to and to direct the defendant Clerk to draw upon the defendant Treasurer a warrant for the payment thereof.

SIXTH: That the defendants in this action, except the defendant Gaynor, from May 4, 1909, down to the commencement of said action, were officers of the Village of Port Chester, to wit: The defendant Thomas F. J. Connolly was the Clerk of the Board of Trustees of said Village; the defendant Thomas F. Connolly was Treasurer of said Village; the defendant Franklin P. Perkins was President, and the other defendants except the defendant Gaynor were and still remain Trustees of the said Village of Port Chester.

SEVENTH: That since the commencement of this action the defendant Franklin P. Perkins died, and the defendant Edward V. Brophy was thereupon appointed and still remains President of the Board of Trustees of the Village of Port Chester.

EIGHTH: That on the 21st day of June, 1909, the Board of Trustees of the Village of Port Chester passed a reso-

Findings

lution authorizing and directing the defendant Perkins on behalf of the said Village to enter into a contract with the defendant Philip B. Gaynor, a copy of which contract is annexed to the complaint.

NINTH: That on the 28th day of June, 1909, the said defendant Perkins, assuming to act under the said resolution, and in the name of the Village of Port Chester, and also the defendant Gaynor, did sign and acknowledge the execution of the said contract, a copy of which is annexed to the complaint.

TENTH: That at the beginning of the official year of the Village of Port Chester, to wit: in the month of May, 1909, the special funds of the Village were overdrawn \$9,641.08, and the Contingent Account was overdrawn to the extent of \$4,922.16, and in addition the said Village had then incurred a further indebtedness for fire apparatus and street improvements to the extent of \$93,823.17, being a total of \$103,466.25 unsecured indebtedness.

ELEVENTH: That on the 7th day of June, 1909, a report of the Finance Committee of the Board of Trustees shows that there was a balance in the Treasury of \$280.74, and that the bills ordered paid on said 7th day of June, 1909, amounted to \$41,396.63, and that bonds of the Village were falling due on the first day of July next thereafter amounting to \$6,408.81.

TWELFTH: That on the 28th day of June, 1909, a large number of drafts, which had been drawn on the 7th day of said month, had not been honored and were still unpaid.

THIRTEENTH: That no proposition was ever adopted authorizing the Board of Trustees of the Village of Port Chester to raise the money to meet the expenditure involved in the contract annexed to the complaint.

FOURTEENTH: That neither upon the 21st nor upon the 28th day of June, 1909, had the Village of Port Chester on hand the \$6,000 to be expended by the contract annexed to the complaint entered into on said last-named day, nor any money applicable to such expenditure.

Findings

FIFTEENTH: That all the moneys received by the Village of Port Chester during the months of July, August, September and October, 1909, were expended and continuously drawn against in advance of collection.

SIXTEENTH: That a meeting of the Board of Trustees was called for the 25th day of October, 1909, which call stated that the purpose and object of such meeting was to take steps to procure a loan on the faith and credit of the Village and to hear the report of Philip B. Gaynor, and to take whatever action on the same the Board might deem proper.

SEVENTEENTH: That at the meeting of the Board of Trustees next previous to the 25th day of October, 1909, the Village Treasurer reported that he had but \$2,519.38 cash on hand, and that drafts amounting to \$22,914.63 upon him were unpaid. He also submitted a report showing bills falling due and to fall due during the current month amounting to \$12,897.62.

That not until August 9th, 1909, was the levy of any taxes authorized for the expense of the Village for that year, and the tax roll of the Village of Port Chester for the year 1909 was not completed until the month of December, 1909.

EIGHTEENTH: That the Village of Port Chester had not between the date of the contract annexed to the complaint and the date when by its terms it was to be performed the money, the expenditure of which was involved by said contract, nor any money applicable to such expenditure.

NINETEENTH: That when the contract annexed to the complaint was made, the Village of Port Chester had a list of all its unpaid taxes and assessments.

TWENTIETH: That the books of the Receiver of Taxes of the Village of Port Chester had been regularly audited as required by law each year previous to and including the year 1909.

TWENTY-FIRST: That the Treasurers of the Village of Port Chester had each year previous to and including the

Findings

year commencing May, 1909, filed annual reports which were regularly audited.

TWENTY-SECOND: That on October 25th, 1909, the date of the meeting called to receive the report of Philip B. Gaynor, the Village of Port Chester had not on hand the money the expenditure of which was involved by the contract annexed to the complaint, nor any money applicable to such expenditure.

TWENTY-THIRD: That the contract or paper writing entered into between the defendant Gaynor and the defendants assuming to act for the Village of Port Chester, was not made and executed for a proper village purpose, but was beyond the power and authority of the defendant trustees to make on behalf of the Village of Port Chester.

TWENTY-FOURTH: That the work to be done by the defendant Gaynor according to the terms of the contract annexed to the complaint was not necessary for the purpose of a tax sale or a civil action to collect taxes.

TWENTY-FIFTH: That the work of preparing a list of unpaid taxes for the purpose of a tax sale did not involve technical knowledge, but could have been performed by the ordinary village officers.

AS CONCLUSIONS OF LAW

I. That the work to be done by the defendant Gaynor according to the terms of the contract annexed to the complaint was not necessary for the purpose of a tax sale or a civil action to collect taxes.

II. That the contract or paper writing entered into between the defendant Gaynor and the defendants assuming to act for the Village of Port Chester was not made and executed for any proper village purpose and was beyond the power and authority of the defendant trustees to make on behalf of the Village of Port Chester.

III. That the work of preparing a list of the unpaid taxes for the purpose of a tax sale did not involve technical

Findings

knowledge, but could have been performed by the ordinary village officers.

IV. That the defendants had no power to delegate to the defendant Gaynor the work of auditing the books of the Tax Receiver or the Village Treasurer.

V. That the defendant trustees have no right to pay out the money of the Village of Port Chester to the defendant Gaynor for auditing the accounts of the Receiver of Taxes or the Treasurer or Clerk of the Village of Port Chester.

VI. That it was the duty of the officers of the Village themselves to keep books of account showing the financial condition and affairs of the Village.

VII. That the defendant trustees had no power or authority to expend the moneys of the Village of Port Chester in paying the defendant Gaynor for teaching the Village Treasurer or other village officers how to perform their official duties.

VIII. That neither at the time when the paper writing or contract annexed to the complaint was executed, nor at the time when by its terms it was to be performed, had the Village of Port Chester the moneys on hand applicable to such purpose, the expenditure of which the said contract involved or required.

IX. That the defendant village officers had no right or authority in the name or on the part of the Village of Port Chester to enter into said contract, and the same is not and never was binding upon the said Village.

X. That payment by the defendants or any of them of any moneys belonging to the Village of Port Chester under the contract annexed to the complaint would be illegal and wasteful and should be enjoined by the Court.

XI. That the plaintiff is entitled to judgment against the defendants and each of them, and for an injunction as prayed for in the complaint.

Dated, April 21, 1910.

JOSEPH MORSCHAUER,

J. S. C.

Judgment

Form No. 20

Judgment; Municipal Corporation; Taxpayer's Action; Injunction;
Restraining Payment for Work done for Municipality under Un-
authorized Contract ¹

At a Special Term of the Supreme Court held in and for
the County of Westchester at the Court House in the
Village of White Plains, on the 21st day of April, 1910.

Present: Hon. JOSEPH MORSCHAUSER, *Justice*.

Title Same as Complaint. } Judgment.

This action having been brought on for hearing and
trial on the issues of fact raised by the pleadings, and the
defendant Gaynor having made default in pleading after
personal service upon him of the summons and verified
complaint, and the written decision or direction of Mr.
Justice MORSCHAUSER, by whom said issues of fact were
tried, having been filed, now on reading and filing the
said decision directing it, and on motion of Frederick W.
Sherman, attorney and counsel for the plaintiff, it is

Ordered, adjudged and decreed that the contract or
paper writing bearing date the 28th day of June, 1909,
a copy of which is annexed to the complaint, marked
Schedule A, and which is signed by the name of Philip
B. Gaynor, and with the name of the Village of Port
Chester, Franklin P. Perkins, President, acknowledged
before William A. Sawyer, Notary Public, on the 28th
day of June, 1909, by the said Philip B. Gaynor, and by

¹ From *Wakefield v. Gaynor*, 207 N. Y. 772; aff'g without opinion
144 App. Div. 905; 128 Supp. 1149; aff'g sub nom., *Wakefield v.*
Brophy, 67 Misc. 298; 122 Supp. 632; same case on motion to continue
temporary injunction, *Wakefield v. Perkins*, 65 Misc. 619; 120 Supp.
635. Motion to dismiss appeal from 144 App. Div. 905; denied in
203 N. Y. 545. See *ante*, page 224. For complaint, see *ante*, page 226;
for findings, see *ante*, page 235.

Statement of the Case

the said Franklin P. Perkins on behalf of said Village, was and is illegal, and was never binding upon the Village of Port Chester, and the same is hereby declared to be null and void as against the Village of Port Chester.

It is further ordered, adjudged and decreed, that the defendants, and each of them, and the successors of the defendant officers be and hereby are perpetually restrained from in any way carrying out the said contract on behalf of the Village of Port Chester, and from paying from the funds of said Village any moneys under said contract to the said defendant Philip B. Gaynor, or any person representing him, and the said Philip B. Gaynor is hereby restrained and enjoined from collecting or attempting to collect or take from the Village of Port Chester, or from in any way attempting to enforce against the said Village of Port Chester any claim for any money under said contract, or for or by reason of anything done by him or in his behalf under said contract or in relation to the subject-matter thereof, and the defendants and each of them and their successors as officers of the said Village are hereby restrained and enjoined from doing or suffering any act on the part of the said Village towards auditing, allowing or paying any sum under said contract, or conniving at such auditing, allowance or payment.

JOSEPH MORSCHAUER.

[J. S. C.]

JAMES N. RICHARDS v. ERNST WIENER COMPANY,
Appellant.¹

(207 N. Y. 59; aff'g 145 App. Div. 353; 129 Supp. 951)

Corporation; contract to purchase its own stock; defense of lack of surplus profits; burden of proof on corporation

1. Assuming that a contract with a corporation was one in which it agreed to repurchase shares of its own stock rather

¹ For complaint from this case see *post*, page 247.

Opinion of the Court

than a mere option on the part of the original purchaser, where an action on such a contract is defended on the ground that it is illegal under § 664 of the Penal Law, providing that a corporation cannot repurchase its own stock except out of surplus profits; *held* that in defending against the plaintiff's attempt to enforce the contract the burden rested on the defendant of showing that it would be illegal for it to do so by proving that it did not have sufficient surplus profits to carry out the contract.

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 5, 1911, affirming a judgment in favor of plaintiff entered upon a verdict.

J. Woolsey Shepard and *Woolsey A. Shepard* for appellant.

Elbridge L. Adams for Manufacturers' Commercial Company, intervening.

Nathan D. Stern for respondents.

Julien T. Davies and *Herbert Barry*, for George M. Black et al., as surviving trustees, intervening.

HAIGHT, J.:

This action was brought to recover the sum of \$3,000 and interest thereon, claimed to be due from the defendant under a written contract, which is as follows:

"NEW YORK, October 24, 1908.

"Mr. J. N. RICHARDS,

"New York City:

"DEAR SIR.—We beg to confirm our agreement with you as follows:

"(1) You subscribe for 100 shares of our 6% preferred stock of a par value of \$100, at the price of \$10,000 and you agree to pay not less than \$3,000 immediately (\$1,000 at the time of signing this contract, \$2,000 on or before November 10th, 1908), not less than \$5,000

Opinion of the Court

within 6 months after date and the balance within 3 months thereafter, that is 9 months from date.

“(2) In consideration of this purchase of our stock, we agree to employ you in our business and you agree to devote to same your entire time exclusively and to use your very best efforts to further its interest directly or indirectly. We agree to allow you a salary of \$50 per week and a commission on all the new business that you bring us, that is, on all orders from customers, whose first order has been obtained by you. This commission to be 10% on the net profits of such orders. Such profits to result in deducting from the sales price all the expenses had with the order, as f. i., the cost price of the material figures in the regular way, discounts, freight and cartage allowances, etc. Among the expenses on the order to be counted the interests from date of expenditure until date of payment by the customer, all special expenses such as telegrams, long distance telephone messages, traveling expenses if incurred especially, shares of profit to manufacturers if any, and outside commissions, but no general office expenses.

“(3) As soon as you have paid the second installment of \$5,000, on the above purchase of preferred stock, we will guarantee you the above commission in addition to the salary with \$600 per year and we will sign a contract with you on this basis, to be good for not less than 2 years from the date of this letter.

“If, however, you should fail to pay the second installment, we will have the option to discontinue your employment, and if in this case you should not want to have the first installment paid by you considered as the purchase price in full for 30 shares of our preferred stock, then we shall repurchase these 30 shares of stock from you at par within 6 months thereafter. If, however, at any time during the first 6 months or at the end of same you should discontinue your services of your own account and fail to pay in the \$5,000, then the first installment of \$3,000

Opinion of the Court

paid in by you shall be considered as the purchase price in full for 30 shares of our preferred stock without any obligation on our part to repurchase same.

"In case this agreement should be terminated the commission will be paid on all orders coming under this agreement, such as have been received in our office, before the date of expiration of this contract whether accepted and executed before this date or thereafter.

"Please acknowledge this agreement, and oblige,

"Yours very truly,

"ERNST WIENER COMPANY,

"WALTER J. BRIGGS, *Sec'y.*"

It appears that the plaintiff thereupon paid to the defendant the sum of \$3,000, being the first of the two sums mentioned in the contract, and then entered the employment of the defendant and continued therein until the 14th day of August, 1909. He did not, however, at the expiration of the six months pay the additional sum of \$5,000 upon the contract, but notified the defendant that he was unable to do so. Thereupon and on the 14th day of August, 1909, the defendant wrote the plaintiff as follows: "After a fair trial we have come to the conclusion that you are not competent to fill the position now occupied by you nor do the results warrant our keeping you, and we, therefore, beg to notify you that with the payment of this week's salary your services will not be required after this date." (Signed by the defendant company.) At the same time the defendant company drew a certificate for thirty shares of preferred capital stock of the corporation and delivered the same to the plaintiff. Thereupon the plaintiff wrote the defendant as follows: "Having received from you under date of the 14th notice that my services were no longer required by your Company, I beg to notify you that I shall require you to repurchase from me thirty (30) shares of your preferred stock for which I have heretofore paid you the sum of Three Thousand (\$3,000) Dollars, but which stock was never delivered

Opinion of the Court

to me, as I do not wish to have the money paid in by me under the contract between us bearing date October 24th, 1908, considered as the purchase price of said thirty (30) shares." The chief defense interposed in the case is to the effect that the provision of the contract with reference to purchasing back the stock was void and contrary to the provisions of the Penal Law and is contrary to public policy and to the law. Section 664 of the Penal Law, formerly § 594 of the Penal Code, provides as follows:

"A director of a stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended: * * *

"5. To apply any portion of the funds of such corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock, is guilty of a misdemeanor."

We are much impressed with the contention that the contract in this case, properly construed, amounts merely to an option to purchase stock on the part of the plaintiff, and the advancement on such option of \$3,000 upon condition that he be given employment by the corporation at the price agreed upon, and that in case the company terminated such employment he had the right to demand the return of the money that he had advanced. But we have thought it wise in this case to follow the Appellate Division. Assuming, therefore, that under the contract the plaintiff had the title to the stock which he could resell but for the provision of the Penal Law, the defendant nevertheless was required to prove its invalidity, under the law referred to. Upon the trial there was an attempt to show that the corporation had no surplus profits out of which the purchase of the stock could be made. But the evidence offered upon this subject was not proper and consequently was excluded by the trial court. We, therefore, have a case in which the corporation has failed to show that it did not possess surplus profits out of which the stock could be purchased.

Complaint

As was said by SCOTT, J., below: "The law will not presume, unless forced to do so, that a person intends to do an illegal act. It will not, therefore, presume that the parties intended to make an illegal contract. The contract itself, therefore, was perfectly legal subject to certain limitations upon its enforceability. If when the time came defendant had a sufficient surplus the contract would be enforced. If it had not the contract could not be enforced. In defending against plaintiff's attempt to enforce it the burden rested upon defendant to show that it would be illegal to do so, for there is no presumption one way or the other as to the existence of a surplus. The defendant assumed this burden but failed in sustaining it. * * *"

The judgment appealed should be affirmed, with costs.

CULLEN, Ch. J., VANN, WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur; COLLIN, J., absent.

Judgment affirmed.

Form No. 21

Complaint; Corporations; Action to Enforce Contract by the Corporation for Repurchase of its own Stock ¹

Supreme Court of the State of New York.

<p>James N. Richards, Plaintiff, against Ernst Wiener Company, Defendant.</p>	}	<p>Trial desired in New York County.</p>
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Plaintiff above named, complaining of the above-named defendant, respectfully shows:

¹ From *Richards v. Ernst Wiener Company*, 207 N. Y. 59; aff'g 145 App. Div. 353; 129 Supp. 951. See *ante*, p. 242.

Complaint

I. That at all times hereinafter mentioned, defendant was and now is a domestic corporation.

II. That heretofore and on or about the 24th day of October, 1908, for a valuable consideration, plaintiff and defendant made and entered into an agreement, a copy of which is hereto annexed marked Exhibit "A" and hereby made a part hereof.

III. That thereafter and in pursuance of the terms of said agreement, plaintiff paid to the defendant the sum of three thousand dollars, and in all respects duly performed all the terms, covenants and conditions of said agreement on his part entered into. (This paragraph of the complaint was amended upon the trial by the insertion of the following words: "That the sum of Five thousand dollars was not paid in by the plaintiff under said contract and that thereafter and on or about the 14th day of August, 1909, the defendant discharged the plaintiff.")

IV. That thereafter and on or about the 14th day of August, 1909, after the payment of the said sum of three thousand dollars by the plaintiff to the defendant under and in accordance with the terms of said agreement, the defendant notified the plaintiff that he had been discharged from the service of the defendant, and that his services would not be required after said date.

V. That thereafter and on or about the 16th day of August, 1909, the plaintiff notified the defendant that, pursuant to the terms of the said agreement, he would require the defendant to repurchase from him the thirty shares of the preferred stock of the defendant company, which he had theretofore received from the defendant, and for which he had paid the sum of three thousand dollars therefor, and that plaintiff thereupon requested the defendant to repurchase said thirty shares of preferred stock of the defendant corporation for the said sum of three thousand dollars.

VI. That thereafter and on the 17th day of February, 1910, the plaintiff duly tendered to the defendant said

Complaint—Exhibit "A"

thirty shares of the preferred stock of the defendant corporation, and demanded the sum of three thousand dollars therefor.

VII. That the defendant failed and neglected and refused to accept or purchase said thirty shares of preferred stock of the defendant corporation, or to pay therefor the said sum of three thousand dollars, or any sum whatsoever.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of three thousand dollars, with interest thereon from the 16th day of February, 1910, and the costs of this action.

JELLENIK & STERN,
Attorneys for Plaintiff,
115 Broadway,
Borough of Manhattan,
New York City.

EXHIBIT "A"

NEW YORK, October 24, 1908.

Mr. J. N. Richards,
New York City.

Dear Sir:—

We herewith beg to confirm our agreement with you as follows:—

(1) You subscribe for 100 shares of our 6% preferred stock of a par value of \$100, at the price of \$10,000 and you agree to pay not less than \$3,000 immediately (\$1,000 at the time of signing this contract, \$2,000 on or before November 10th, 1908), not less than \$5,000 within 6 months after date and the balance within 3 months thereafter, that is 9 months from date.

2. In consideration of this purchase of our stock, we agree to employ you in our business and you agree to devote to same your entire time exclusively and to use your very best efforts to further its interest directly or indirectly. We agree to allow you a salary of \$50.00 per week and a commission on all the new business that you

Complaint—Exhibit "A"

bring us, that is, on all orders from customers, whose first order has been obtained by you. This commission to be 10% on the net profits of such orders. Such profits to result in deducting from the sales price all the expenses had with the order, as f. i. the cost price of the material figures in the regular way, discounts, freight and cartage allowances, etc. Among the expenses on the order to be counted the interests from date of expenditure until date of payment by the customer, all special expenses such as telegrams, long distance telephone messages, traveling expenses if incurred especially, shares of profit to manufacturers if any, and outside commissions, but no general office expenses.

3. As soon as you have paid the second installment of \$5,000 on the above purchase of preferred stock, we will guarantee you the above commission in addition to the salary of \$600 per year and we will sign a contract with you on this basis, to be good for not less than 2 years from the date of this letter.

If, however, you should fail to pay the second installment, we will have the option to discontinue your employment, and if in this case you should not want to have the first installment paid by you considered as the purchase price in full for 30 shares of our preferred stock, then we shall repurchase these 30 shares of stock from you at par within 6 months thereafter. If, however, at any time during the first 6 months or at the end of same you should discontinue your services of your own account and fail to pay in the \$5,000, then the first installment of \$3,000 paid in by you shall be considered as the purchase price in full for 30 shares of our preferred stock without any obligation on our part to repurchase same.

In case this agreement should be terminated the commission will be paid on all orders coming under this agreement, such as have been received in our office, before the date of expiration of this contract whether accepted and executed before this date or thereafter.

Statement of the Case

Please acknowledge this agreement, and oblige.

Yours very truly,
 ERNST WIENER COMPANY,
 Walter J. Briggs, Sec'y.

[*Verification.*]

FRANK QUIGLEY, Respondent, v. JOHN THATCHER & OTHERS, co-partners under the firm name of JOHN THATCHER & SON, Appellants.¹

(207 N. Y. 66; aff'g 144 App. Div. 710; 129 Supp. 170)

Negligence; contractor's liability to employ  s of subcontractor for defects in scaffold erected for the use of contractor's own employ  s

1. When a contractor constructs and erects a scaffold or platform that his subcontractor must, of necessity, or under the requirements of reasonable convenience in the performance of his work, use the same, the contractor may be held to have anticipated such use and to have assumed liability to such subcontractor and his employ  s for the safety thereof under the provisions of § 18 of the Labor Law, providing that "a person employing or directing another, * * * in the erection * * * repairing, altering or painting of a house, building * * * shall not furnish * * * scaffolding, hoists, stays,

¹ For complaint from this case see *post*, page 255.

For charge of trial judge see *post*, page 259.

For complaint in action by employ   of subcontractor against general contractor and subcontractor for injuries caused by the falling of a scaffold furnished by the general contractor, from *Coleman v. J. L. Mott Iron Works*, 198 N. Y. 545, see BRADBURY'S RULES OF PL., page 798.

For complaint in action by employ   against employer for failure to provide a safe scaffold upon which to work under Labor Law, § 18, from *Caddy v. Interborough Rapid Transit Co.*, 195 N. Y. 415, see BRADBURY'S RULES OF PL., page 773.

Opinion of the Court

ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department entered May 9th, 1911, affirming a judgment in favor of the plaintiff entered upon a verdict.

Benjamin Reass for the appellants.

Mann Trice and *J. A. Kuck, Jr.*, for respondent.

HISCOCK, J.:

The defendants were general contractors who had undertaken the erection of a large building. They made a sub-contract with a corporation to put fire-proofing in the building and plaintiff was in the employ of this sub-contractor. The jury were permitted by the evidence to find that defendants had erected on the skeleton framework of the second floor of the building a scaffold or platform for the use of their own immediate employes in laying brick; that as plaintiff walked on this structure for the purpose of reaching a point where he desired to perform work engaged to be performed by his employer a plank gave way and he fell and was injured. The jury also had a right to find that there was no other appropriate way for plaintiff to reach the place of his labors except over this scaffold. On this point his evidence ran as follows:

"Q. Was this (referring to this platform) the most direct way for you to go to get to your work? A. I was going to work on that section at that time.

"The Court: Was there any other way, is what you want to get down to now. The question is, was there any other way of getting there?

"The Witness: No, sir, there was not. * * *

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"The Court: * * * That was the only way you had to get there, wasn't it?

"The Witness: Yes, sir."

There was no evidence that defendants in their contract with plaintiff's employer expressly undertook to furnish scaffolds necessary for the performance of its contract.

Under these circumstances the question arises whether plaintiff can invoke as a basis of liability on the part of the defendants § 18 of the Labor Law (Cons. Laws, ch. 31), which provides: "A person employing or directing another * * * in the erection, repairing, altering or painting of a house, building * * * shall not furnish * * * scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

We think that this question is to be answered in the affirmative, but for the purpose of doing this we do not deem it necessary to go so far as did the learned Appellate Division according to our understanding of its opinion. We doubt whether in the absence of express agreement there is so written into the contract between contractor and subcontractor the provisions of the Labor Law that the former forthwith and without proof of other facts becomes liable to the latter and his employés for the safety of scaffolds erected by the contractor simply for the use of his own employés.

But this statute is one for the protection of workmen from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed, and under such interpretation we think that a contractor may by course of events become liable to a subcontractor and his employés for the safety of a scaffold although originally and expressly he assumed no such responsibility.

Without attempting to forecast other illustrations of

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liability which might thus arise, we think that when a contractor constructs and so locates a scaffold or platform that his subcontractor must of necessity or under the requirements of reasonable convenience in the performance of his work use the same the contractor may be held to have anticipated such use and to have assumed liability to such subcontractor and his employes for the safety thereof. Such is the present case. The jury were justified in finding that the scaffold or platform constructed by the defendants so extended from the entrance to the second floor across the beams to the point where plaintiff's work called him that there was no other reasonable way to proceed than over it. It would have been useless if not difficult for plaintiff's employer to construct another scaffold in that part of the building so long as defendants' was there, and plaintiff's only course was to use the latter or else step from beam to beam in the open framework of the floor. In such a situation we think that the defendants could be held to have foreseen or to have been obliged to foresee that their structure would be used as plaintiff was using it at the time of his accident, and that they, doing nothing to prevent this use, were bound to comply with the requirements of the statute in keeping it in proper condition for his use. It is not necessary to consider whether a contractor might on this theory be made liable for the safety of a scaffold when subjected by a subcontractor to an use involving a much greater strain than that for which the scaffold was designed, for no such feature is present in this case.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., HAIGHT, VANN, CHASE and COLLIN, JJ., concur; WILLARD BARTLETT, J., not voting.

Judgment affirmed.

Complaint

Form No. 22

Complaint; Negligence; Liability of Contractor to Employés of Sub-contractor for Defects in Scaffold Erected for the Use of the Contractor's Own Employés¹

Supreme Court, Kings County.

Frank Quigley, Plaintiff, against John Thatcher and Edwin H. Thatcher, co-partners doing business under the firm name and style of John Thatcher & Son, and Columbian Re-en- forced Concrete Company, Defendants.	
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The plaintiff above named complains against the above-named defendants and alleges:

FIRST: That the above-named defendants, John Thatcher and Edwin H. Thatcher were at all the times herein mentioned or referred to co-partners and doing business as such in the City of New York under the firm name and style of John Thatcher & Son.

SECOND: That the above-named defendant, Columbian Re-enforced Concrete Company, is now and at all the times herein mentioned or referred to, was a corporation, created, organized and existing by or under the laws of the State of New Jersey but doing business and having a place for the transaction thereof within the City of New York.

THIRD: This plaintiff further alleges, that some time

¹ From *Quigley v. John Thatcher & Son*, 207 N. Y. 66; aff'g 144 App. Div. 710; 129 Supp. 170. See *ante*, page 251. For charge of trial judge see *post*, page 259.

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before he received the hurts and injuries hereinafter stated and set forth, but at what precise time plaintiff is unable to state, a contract had been awarded to the said defendants, John Thatcher and Edwin H. Thatcher as co-partners as aforesaid, for the erection and construction at or near the junction of St. Felix Street and Lafayette Avenue in the Borough of Brooklyn, City of New York, of a building known and designated as the Academy of Music, and said defendants, John Thatcher, and Edwin H. Thatcher, as such co-partners as aforesaid, were at the time of the receipt by plaintiff of the hurts and injuries hereinbefore referred to and hereinafter particularly set forth, actually engaged in the construction and erection of the said building.

FOURTH: That some time prior to the 5th day of August, 1907, the said firm or co-partnership of John Thatcher & Son, made and entered into a contract or agreement with the defendant, Columbian Re-enforced Concrete Company whereby the said company undertook, promised and agreed to do and perform certain fire-proofing and other work upon the said building, in furtherance of the construction thereof, and on said 5th day of August, 1907, said defendant company was engaged in the performance of the work it had so as aforesaid undertaken to do and perform under its said agreement, and this plaintiff was, on said 5th day of August, 1907, in the service and employment of the said defendant, Columbian Re-enforced Concrete Company, and was, under the order and direction of the said defendant company, engaged in work upon the said building pursuant to the terms of a contract of hiring theretofore made and entered into by him with the said defendant company, and was aiding in the construction of the said building.

FIFTH: That in and by the said contract so as aforesaid awarded to the said defendant, Columbian Re-enforced Company, the defendants, John Thatcher and Edwin H. Thatcher, as such co-partners, as aforesaid, undertook,

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promised and agreed to and did furnish and provide the said defendant, Columbian Re-enforced Concrete Company, with all stagings, scaffoldings, platforms, floorings and ladders needed and required by the said company in the performance of work under its said contract with said John Thatcher & Son, and the said defendant company from the time it commenced work under its said contract, used and employed certain stagings, scaffoldings, platforms, floorings and ladders furnished and provided by the defendants, John and Edwin H. Thatcher as such co-partners, with the full knowledge and consent of the defendants, John Thatcher & Son, who had warranted and guaranteed the sufficiency and safety thereof for the purposes for which they were to be employed.

SIXTH: That it became and was the duty of the defendants to furnish and provide this plaintiff, while engaged in the performance of work upon said building under his said contract of hiring, to furnish and provide this plaintiff with a reasonably safe place within which and with reasonably safe tools, implements, appliances and instrumentalities with which to do and perform the work required by him upon said building, and by a suitable and proper inspection to keep and maintain the same in a reasonably safe and secure condition, and to give this plaintiff notice and warning of the existence of dangers and perils attending the performance of his duties upon said building that were not open or patent and visible.

SEVENTH: That on the 5th day of August, 1907, while this plaintiff was in the service and employment of the said defendant company, pursuant to his said hiring contract, he was ordered and directed by his said employer, to go upon the second floor of said building and to there engage in the performance of certain work, and that in order to reach the place or point where he was ordered and required to perform such work, it became and was necessary for this plaintiff to pass over and upon certain planks and flooring laid upon the girders and beams of the said

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second story of the said building and which said planks were part and parcel of the flooring, platforms and scaffolding furnished and provided by the defendants, John Thatcher and Edwin H. Thatcher as such co-partners as aforesaid.

EIGHTH: That the said defendants, unmindful of their duty and obligation to furnish and provide this plaintiff with a reasonably safe place within which and with reasonably safe tools, appliances and instrumentalities with which to perform the work required of him upon said building, had negligently and carelessly placed upon the said beams and girders of said second floor certain planks in an unsafe and insecure manner and had permitted and allowed, negligently and carelessly, the ends of many of said planks to remain with no support whatsoever, and had negligently and carelessly hidden or allowed to be hidden and obscured the said unsupported ends of said planks, had negligently and carelessly failed and omitted to inspect the said planks and flooring and had negligently failed and omitted to properly light the said second story of said building and the dangerous, unsafe and insecure condition of the said flooring of said second story could not have been discovered by the exercise of proper care and caution.

NINTH: That on said 5th day of August, 1907, while this plaintiff was proceeding with all proper care and caution to the place where he was required and directed to engage in work upon the second floor or story of said building, he stepped upon the end of one of the said planks, and the same, by reason of the fact that it was wholly without support, was by the weight of this plaintiff's person, tilted or deflected downwards, and this plaintiff was by reason thereof precipitated with great force and violence downwards to the first or ground floor of the said building, from a height of twenty-five feet and by reason thereof and by reason of the contact of plaintiff's person with the said lower floor, this plaintiff suffered and sustained a fracture of the bones of his right foot and the bones of his right heel

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were also broken and plaintiff at the same time and by the same means, received and sustained upon other parts of his person many other lasting and painful bruises, contusions and abrasions, and was thereby made sick, sore, lame and disabled, and has ever since receiving said injuries so remained and continued, and has ever since been unable to do or perform any manual labor whatsoever, and he further alleges that he has been subjected to great expense in the procurement of medicines, medical attendance and nursing in the effort to be cured of his said hurts and injuries, and he further alleges that his said injuries are permanent and incurable.

TENTH: That said accident happened and said injuries were received through no fault or negligence on the part of this plaintiff but solely through and by reason of the concurring and co-operating negligence and carelessness of the defendants.

ELEVENTH: That by reason of the foregoing facts this plaintiff has suffered and sustained loss, damage and injury in the sum of Ten Thousand Dollars.

WHEREFORE plaintiff demands judgment against the defendants for Ten Thousand Dollars besides the costs of this action.

TRICE & JOHNSON,
Plaintiff's Attorneys,
154 Nassau Street,
Manhattan,
New York City.

[Verification.]

CHARGE ¹

CRANE, J.:

Gentlemen: At the outset, in order that you may pass fairly and squarely upon the issue which I shall leave for

¹ From *Quigley v. John Thatcher & Son*, 207 N. Y. 66; aff'g 144 App. Div. 710; 129 Supp. 170. See *ante*, page 251.

For complaint from this case see *ante*, page 255.

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your determination, let me call your attention to one or two matters. Many times in the trial of a case points of law arise which call upon me for a ruling. Discussion is entered into sometimes at great length with counsel regarding their idea of the law, and regarding cases which have been decided. You never want to gather a wrong impression from such discussion, or from the rulings, or from the remarks made at the time, or let any such statements or remarks influence you in the least when you come to decide the questions of fact submitted to you. So in this case. My rulings upon the objections made, and my remarks as to what I believed to be the law regarding this case, must in no way influence your judgment in passing upon what the evidence shows to be the fact. The facts we leave to you, when they are disputed; and the law I must pass upon. Now, we come to your part of the case, the decision of the questions of fact; and I will give you the law to apply to the facts as you find them. I speak of this because sometimes jurors may get the idea from the remarks of the Court, that a Judge is against one side or the other. That would be a very poor idea of the administration of justice where the Judge is supposed to be impartial, especially upon these matters which must be left to the jury to decide. In this case, the matters I am going to leave to you, must be decided upon the evidence, irrespective of any opinion you may have as to what I think, for I have no opinion upon these questions of fact although I have upon the law. That is what I am here for. I will give you my opinion upon the law, and that you are to follow.

The defendants, John Thatcher and Edwin H. Thatcher, were constructing the Academy of Music on Lafayette Avenue. They had entered into a contract with the Columbian Re-enforced Concrete Company to do the concrete work about the floors. Frank Quigley was not employed by Thatcher & Son. He was employed by the Columbian Concrete Company. It was necessary for him

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to put certain fastenings upon the beams in order that the concrete arches might go in for the flooring. He undertook to do this at a time when other work was being done in the building, such as ironwork, brickwork and the carpenter work. When he went there to do that work for the Columbian Concrete Company, Thatcher & Son owed him no duty to put up a scaffold for him. If it was necessary in the course of his work to put up a scaffold, then it was the duty of his master, the Columbian Concrete Company, to do that for him; and if he had gotten hurt because there was not a scaffold, he would have no one to blame but his own employer.

It seems, or we will assume for this branch of the case and in explanation of the law, that on the second story there was a scaffold, and that this scaffold ran along the length of Lafayette Avenue, perhaps with an extension going out eighteen feet towards the centre of the building. If this scaffold had been put up by Thatcher & Son for their work, for the mason work, and was there complete on the 5th of August, 1907, no duty rested upon the part of Mr. Thatcher to keep it there for the benefit of the plaintiff. I mean that he could, if he desired, have taken it down. He was not called upon to keep it up for the benefit of the plaintiff. When he got through the work that necessitated it for his purpose, he could have dismantled it, taken it apart, and the plaintiff could not have complained. So we can eliminate these things from the case, because the plaintiff's claim does not and cannot rest upon any such duty upon the part of Thatcher, for there was no such duty.

The plaintiff's claim, therefore, rests upon this point, that there being a scaffold erected and put up by Mr. Thatcher for the use of his men, if it became necessary or became part of the work for the plaintiff to rightfully go upon that scaffold in the due course of his work, or in order to reach his work, if the plaintiff was obliged to walk over it, then the scaffold being there and maintained

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in a complete fashion, the duty, under the Labor Law, rested upon Thatcher and Son to keep it in safe condition. They were not obliged to keep it up. They were not obliged, in the first instance, to erect it. But if it was up, and the plaintiff in order to reach his work was obliged to walk over it, then the duty rested upon Thatcher & Son to keep it in safe condition.

The plaintiff claims that on the 5th of August, 1907, when he went to work there, he went up on the second floor and found a scaffold there from four to eight feet wide running along the brickwork on the Lafayette Avenue side; that he walked along that scaffold for a distance of forty feet. There was nothing the matter with that scaffold, and it did not come down. He says that about forty feet from where he got upon it there was an extension. It has been described to us as some boards put over beams running the distance of about eighteen feet; and that as he was walking along this extension one of the boards fell through and down he went. If this was a scaffold put up by Mr. Thatcher and left up there, and, if in order to get to his work, the plaintiff had to go over it, then I charge you that the falling of the plank under those conditions is some presumption of negligence on the part of Thatcher and Son in maintaining it. If you find that this presumption has not been overcome, and that these facts as testified to by the plaintiff are true, then the defendants were negligent, and must pay the plaintiff for his injuries unless he himself was guilty of contributing neglect.

But the facts are disputed, and this is where your part comes in, to determine them. Mr. Thatcher says, "I put this scaffold up simply for my men. I had no duty upon me to put it up for the concrete men. So when my men got through with the brickwork at this point, we dismantled the scaffold and carried the parts elsewhere; it may be a few boards were left there, but no scaffold was left there; we were in process of dismantling it and

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moving it elsewhere." If this be true, he had the right to do it, and he owed the plaintiff no duty to keep it up. Then if the plaintiff, in order to do his work, took it upon himself to walk over the loose boards, not a scaffold constructed for the purpose of his use, but a scaffold dismantled in process of being taken down, he took his own chances, and cannot recover.

The dispute which you must settle comes right here. Was this scaffold put up, erected and completed, even out to the eighteen foot extension, and left there by Mr. Thatcher for the use of his men? If it was, and the plaintiff had to walk over it to get to his work, then Mr. Thatcher was called upon to keep it in a safe condition. Not being obliged to keep it up, having the right to take it down, if this scaffold was dismantled or being taken apart, and loose boards or some portion of it remained, and the plaintiff started to walk over those, then he cannot recover. He took the chances of their being secure, and he must have found it out for himself.

In this case the plaintiff must prove to you that he exercised reasonable care; which means that he exercised the care a reasonably prudent man would exercise under these conditions. If he did not, he cannot recover any way.

This question of the negligence of the defendants under these circumstances you are to determine according to the charge that I have given you. You are to determine it upon the evidence in the case, uninfluenced by anything that may have happened in the course of the trial and uninfluenced by any outside consideration. You will decide this question fairly, squarely and impartially between these two men. First, was the scaffold complete on the 5th of August, 1907, with the eighteen foot extension? Was it up there for use by Thatcher's men and were they using it? If so, and if the plaintiff had to use it and go over it to get to his work, the defendants were bound to keep it safe for him; and the falling of a plank

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in the course of walking over it would be presumptive evidence of their negligence in the maintaining of it. On the other hand, if Thatcher & Son were, as they had a right to do, taking this scaffold down to shift it and put it somewhere else, and the plaintiff took upon himself to walk over some loose boards to get to his work instead of walking upon the beams and girders as he usually did, then he took the chance himself and cannot claim that Thatcher and son violated their duty to him.

If you find for the plaintiff, then you must give him such sum as will fairly and justly compensate him for his injuries. You cannot speculate. You cannot guess at the amount. You cannot take into consideration and should not take into consideration, in order to be fair, anything else than just the question of the man's injuries. How badly he is hurt, what his condition is now, whether or not his injuries are permanent; and then what sum will fairly and justly pay him for his hurts, together with the loss he may sustain from wages, must be decided by you. On the other hand, if you find for the defendants, your verdict will simply be for the defendants.

Now, gentlemen, if there is anything in the course of this case you do not understand, and you want to ask me about it, ask me now. However, when you get to the jury room, you are free to discuss all you believe to be the facts, for they are for your sole determination. Do not start to discuss the law. Come down and ask me, and I will try and make it plain to you if I have not up to this time.

Are there any requests?

Mr. Trice: I ask your Honor to instruct the jury that they have a right to determine from all the circumstances whether or not Quigley was permitted to be upon this scaffold, that if he was lawfully upon this scaffold and had not been forbidden to go upon it, that they have a right to say that the defendants permitted him to be there; and if they permitted him to be there, the duty devolved

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upon the defendants to maintain it in a safe way while he was upon the scaffold.

The Court: I have gone a great deal further than that. I have said that if the scaffold was left in a complete fashion and the man to get to his work had to walk over it, it makes no difference whether the defendants knew he was there or not. I will charge it if you want it, but I have gone further than you. I gave Mr. Hirsh a square ruling on that one point, as I stated to you at the close, and ruled against you on the others.

Mr. Hirsh: I except to so much of your Honor's charge as states to the jury that there being a scaffold for the use of the defendants' men, it became part of the work of the plaintiff, for the plaintiff to reach his work, to walk over it.

The Court: If it became necessary for him.

Mr. Hirsh: If it became necessary. I am not quoting your Honor's exact language. I only call your Honor's attention to it. That the duty rested upon Thatcher & Son to keep it in safe condition. I except to that.

The Court: Under the Labor Law?

Mr. Hirsh: Yes. I except to it on the ground that he owed him no duty whatever under your Honor's charge. I also except to so much of your Honor's charge as stated practically that if this extension to the scaffold was necessary for the plaintiff to walk on, there is a presumption of negligence against Thatcher & Son. I except to that because the evidence is, by the plaintiff himself, that it was not necessary to go over this platform, that the girders was the place for him to go.

The Court: I do not mean it as broadly as that. I mean if that extension was there and it was a scaffold and complete, not a lot of loose boards thrown on there, but it was a scaffold and complete over these girders, and the plaintiff to reach his work walked down that platform or that scaffold, that then the duty rested upon Thatcher & Son under the Labor Law to see that it was safe;

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but that if they were loose boards, left in the process of dismantling the scaffold, if the plaintiff chose to go that way instead of going on the girder he took his chance.

Mr. Hirsh: The witness Lynagh testified that they were loose boards.

The Court: I am not citing what the witnesses said. The jury will determine the fact.

Mr. Hirsh: I except to your Honor's charge to that. I also except to your Honor's charge in which you say if the plaintiff—your Honor practically repeated the former part of the charge—that if the plaintiff had to use this on August 5th, 1907, that the falling of the plank would be a presumption of negligence on the part of the defendants.

The Court: Yes. In other words, if this was a scaffold, so that the defendants were obliged, so far as this plaintiff was concerned, to keep it safe, the falling of the plank would be presumptive evidence of negligence.

Mr. Hirsh: Yet your Honor charges no duty was incumbent upon the defendants, so far as the plaintiff was concerned, to keep it safe.

The Court: No. I have not charged that. I said he had no duty to erect it. He had no duty to keep it up. He could take it down. But if it was up, and others had to walk over it to get to their work, then the duty rested upon him to keep it safe.

Mr. Hirsh: There is another defendant, and there has not been any motion made as to the other defendant by the plaintiff.

The Court: What about this other defendant?

Mr. Trice: We discontinued as to the other defendant.

The jury then retired and subsequently rendered a verdict in favor of the plaintiff in the sum of \$2,500.

Mr. Hirsh: I move to set aside the verdict and for a new trial on all the grounds stated in § 999 of the Code. On the further ground that the case should not have gone to the jury at all, on the ground that a different cause

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of action was made out and submitted to the jury than charged in the complaint; and I move for a new trial on all these grounds.

Motion denied. Defendants excepted.

A stay of thirty days is granted and sixty days to make a case.

This case contains all the evidence given on the trial of this action.

GEORGE E. GARRISON, Respondent, v. SUN PRINTING AND PUBLISHING ASSOCIATION, Appellant.¹

(207 N. Y. 1; aff'g 150 App. Div. 689; 135 Supp. 721; aff'g 74 Misc. 622; 134 Supp. 670. See same case on motion to compel plaintiff to separately state and number causes of action, 144 App. Div. 428; 129 Supp. 448)

Libel; recovery by husband for loss of services of wife due to physical suffering resulting from mental distress by reason of publication which is libelous per se

1. A husband may recover for loss of services of his wife caused by her sickness resulting from mental distress, which in turn

¹ For complaint from this case see *post*, page 276.

For complaint in action for libel from *Powers v. Ridder*, 142 App. Div. 457; 126 Supp. 820, see 1 BRADBURY'S PL. & PR. REP. 206.

For complaint in action for libel in charging a nurse with insanity due to an unfortunate love affair, from *Gressman v. Morning Journal, Assn.*, 197 N. Y. 474, see BRADBURY'S RULES OF PL., page 1087..

For complaint in action against a corporation for libel in charging the plaintiff with larceny, in a letter, from *Rose v. Imperial Engine Co.*, 195 N. Y. 515, see BRADBURY'S RULES OF PL., page 1090.

For complaint in action for libel which exposes the plaintiff to ridicule, from *Triggs v. Sun Printing & Pub. Assn.*, 179 N. Y. 144, see 1 BRADBURY'S FORMS OF PL. 932.

For complaint in action for libel in stating that a woman posed as a man, from *Minch v. Mail & Express Co.*, 190 N. Y. 503, see 1 BRADBURY'S FORMS OF PL. 935.

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was caused by defendant's willful and malicious publication concerning her of defamatory words which are actionable *per se*.

2. It seems that an action to recover for the publication of defamatory words not actionable in themselves cannot be sustained by proof of mental distress and physical pain suffered by the plaintiff as a result thereof.

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 31, 1912, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint.

The following question was certified: "Does the second cause of action alleged in the second amended complaint herein state facts sufficient to constitute a cause of action?"

James M. Beck and *Carl A. Mead* for appellant.

Herbert H. Gibbs for respondent.

HISCOCK, J.:

By demurrer to one of the purported causes of action set forth in the complaint, the question is presented whether a husband may recover for loss of services of his wife caused by her sickness resulting from mental distress which in turn was caused by the defendant's willful and malicious

For complaint in an action for libel concerning the actions of a city magistrate, from *Crane v. Bennett*, 177 N. Y. 106, see 1 BRADBURY'S FORMS OF PL. 938.

For complaint in an action for a libel which injured the plaintiff in his business, from *Daily v. Engineering & Mining Journal*, 94 App. Div. 314; 88 Supp. 6, see 1 BRADBURY'S FORMS OF PL. 942.

For complaint in an action for libel against a physician relating to his professional capacity, from *Bornmann v. Star Co.*, 174 N. Y. 212, see 1 BRADBURY'S FORMS OF PL. 944.

See also 1 BRADBURY'S FORMS OF PL. 946 *et seq.*, for a further large variety of forms of complaints in libel actions.

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publications concerning her of defamatory words actionable *per se*. There is no question but that the published words are libelous *per se*, and whatever facts may be established on a trial, we must assume for the purposes of this appeal, in accordance with defendant's admissions conceded to be implied from its demurrer, that the defendant not only published them of and concerning plaintiff's wife, but that it did so "wickedly and maliciously and intentionally and willfully," for thus it is alleged in the complaint.

Inasmuch as plaintiff's right to recover, if at all under the circumstances, must in effect be derived through his wife, it will be important in the first place to inquire whether the wife herself might recover for mental distress and physical sufferings resulting from the willful and malicious publication of such libelous words.

It was early established in this State by decisions which do not appear to have been overruled or limited, that an action to recover for the utterance of defamatory words, not actionable in themselves, could not be sustained by proof of mental distress and physical pain suffered by the complainant as a result thereof. *Terwilliger v. Wands*, 17 N. Y. 54; *Wilson v. Goit*, 17 N. Y. 442. And the same doctrine seems to have prevailed in England. *Allsop v. Allsop*, 5 H. & N. 534; *Lynch v. Knight*, 9 H. of L. Cases, 577, 592.

On a superficial examination of the opinion in *Terwilliger v. Wands*, and on which rested the decision in *Wilson v. Goit*, it would seem to be founded on reasons which would be as applicable to a case of defamatory words actionable in themselves as to one where the words were not thus in themselves actionable and required proof of special damages. It was held that special damages of the kind stated and of which recovery was there being sought, were not such natural, immediate and legal consequences of the words spoken as to sustain the action. A more careful examination, however, discloses that the real and full

theory on which a recovery was refused was that an action for slander or libel is brought to recover fundamentally for injury to *character* and that the special damages necessary to sustain such an action must flow from disparaging and injuring it; that illness "was not in a legal view, a natural, ordinary one (consequence), as it does not prove that the plaintiff's character was injured. The slander may not have been credited by or had the slightest influence upon any one unfavorable to the plaintiff." It was further remarked that "this element of an action for slander in a case of words not actionable of themselves—that the special damages must flow from impaired reputation—" had been overlooked in several cases, but that, nevertheless, "Where there is *no proof that the character has suffered* from the words, if sickness results it must be attributed to apprehension of loss of character, and such fear of harm to character with resulting sickness and bodily prostration, cannot be such special damage as the law requires for the action. The loss of character must be a substantive loss, one which has actually taken place" (pp. 62-63).

Both the *Terwilliger* and the *Wilson* cases took pains to limit their effect to cases of defamatory words not actionable in themselves. Their plain intent was to declare that an action of libel or slander involves as its very foundation an injury to character; that where the language complained of is not of such a character that the law presumes an injury, but requires proof of special damages, this requirement cannot be satisfied by simply proving that the plaintiff had been made sick, there being no proof whatever of injury to the character, which involves the effect of the defamatory words on third persons rather than on the complainant himself. *Hamilton v. Eno*, 16 Hun, 599, 601. It will be seen that this reasoning does not apply to a case where the words are actionable in themselves because there the law presumes an injury to character which of itself will sustain an action, and proof of

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mental or physical suffering is presented as an element of additional or special damages accompanying or resulting from the injury to character thus presumed.

Expressions are to be found in some of the decisions of this court which might seem to suggest the conclusion that proof of such suffering is allowed only as a basis for punitive and not as a basis for compensatory damages. *Brooks v. Harison*, 91 N. Y. 83, 91; *Warner v. Press Pub. Co.*, 132 N. Y. 181. But if these or other cases left any doubt of the right of a plaintiff in an action for the utterance of defamatory words actionable *per se* to recover compensatory damages for mental distress, this doubt was dispelled and such right fully established by the case of *Van Ingen v. Star Co.*, 1 App. Div. 429; 37 Supp. 114; *aff'd* 157 N. Y. 695, on the opinion of Mr. Justice INGRAM in the Appellate Division. While the opinion touches briefly on this question of the right thus to recover in such a case for mental sufferings, the printed record shows that the question was fairly and plainly involved and presented and that the decision must be regarded as an adjudication of this question. See also, as supporting such conclusion: *Aaron v. Ward*, 203 N. Y. 351, 354; *Ransom v. N. Y. & Erie R. R. Co.*, 15 N. Y. 415, 420; *Burt v. McBain*, 29 Mich. 260; *Markham v. Russell*, 12 Allen, 573, 575; *Swift v. Dickerman*, 31 Conn. 285; *Childers v. San Jose Mercury P. & P. Co.*, 105 Cal. 284, 289; *Lehrer v. Elmore*, 100 Ky. 56, 60; *Finger v. Pollack*, 188 Mass. 208; *Adams v. Smith*, 58 Ill. 417, 421.

While the further proposition does not appear to have been specifically decided in this State, I have no doubt that a plaintiff being entitled to recover compensatory damages for mental distress resulting from the publication of defamatory words actionable in themselves may likewise recover for physical sufferings brought about by or attending such mental distress. It is true that the physical sufferings as in this case may be removed one step further from the wrong than the mental disturbance which gives

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rise to them, but this fact of itself does not prevent a recovery provided these damages otherwise come within the rules applicable to such a subject.

The general rule in torts applied to such actions as those of negligence is that a wrongdoer is responsible for the natural and proximate consequences of his conduct, and what are such consequences must be generally left for the determination of the jury. *Ehrgott v. Mayor, etc., of N. Y.*, 96 N. Y. 264, 282; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469. The essential requirements in such cases are that the damages shall be directly traceable to the wrongful act and not the consequence of some intervening outside cause and that they shall be the natural result thereof. Under this rule it has been held in this State, as in others, that in an action for negligence a plaintiff may not recover for physical sufferings, as a miscarriage, resulting purely from fright where there was no physical injury; that to allow a recovery in such a case would be to recognize damages which were not natural and ordinary. *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 110; *Hack v. Dady*, 134 App. Div. 253; 118 Supp. 906. While there can be no question under the admitted allegations of the complaint that the wife's sickness in this case was directly connected with defendant's wrongful act by an unbroken chain of cause and effect, it is urged under decisions of the class last referred to that such physical sufferings resulting from mental distress are too remote and unusual to become a subject for compensation.

I think the rule of the cases referred to is not here applicable for two reasons. In the first place it might well be said that substantial physical sufferings resulting from mere mental action are not a natural result of negligent conduct which generally makes itself felt by inflicting some actual and direct physical injury. In the case of such a wrong as that of libel and slander, however, the natural and immediate effect in the line of results we are now discussing must be on the mind and not on the body and,

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therefore, such mental disturbance and its consequences even in the shape of resulting sickness are fairly to be apprehended.

But in the second place, I think the rule must be regarded as well recognized that in an action brought for the redress of a wrong intentionally, willfully and maliciously committed, the wrongdoer will be held responsible for the injuries which he has directly caused even though they lie beyond the limit of natural and apprehended results as established in cases where the injury was unintentional. *Eten v. Luyster*, 60 N. Y. 252, 260; *Williams v. Underhill*, 63 App. Div. 223, 226; 71 Supp. 291; *Putnam v. Broadway & Seventh Ave. R. R. Co.*, 55 N. Y. 108, 119; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 475; *Spade v. Lynn & B. R. R. Co.*, 168 Mass. 285, 295; *Lehrer v. Elmore*, 100 Ky. 56, 60; *Meagher v. Driscoll*, 99 Mass. 281; *Swift v. Dickerman*, 31 Conn. 285.

In *Spade v. Lynn & B. R. R. Co.* (*supra*), the court, after affirming the rule that in an action for negligence there could be no recovery for physical sufferings resulting from mere fright and mental disturbance, said: "It is hardly necessary to add that this decision does not reach those classes of action where an intention to cause mental distress or to hurt the feelings is shown or is reasonably to be inferred, as for example in cases of * * * slander."

In *Burt v. McBain* (*supra*), which was an action to recover damages for the utterance of words similar to those alleged in this case and like the latter made actionable *per se* by statute, it was held that injury to mind and health were such natural results of such an utterance that they might be shown as an element of damages without even a special declaration thereof.

In *Swift v. Dickerman* (*supra*) it was held that a plaintiff might recover damages for physical sufferings caused by the utterance of words actionable *per se*.

In the *Terwilliger* and *Wilson* cases, already quoted from, it is fairly to be inferred from the pains with which

those decisions were limited to cases of words not actionable *per se* that a different rule would apply and a recovery be allowed for physical sufferings and mental distress resulting from the defamatory utterance of words actionable in themselves.

In the foregoing discussion, of course, there have not been overlooked the case of *Butler v. Hoboken, P. & P. Co.*, 73 N. J. Law, 45, in which the conclusion is reached that such damages as are here asked for may not be recovered, or the expressions of similar views by some textwriters, and which so far as they are based on any direct authority rest on the *Butler* case.

The *Butler* case cites no direct authority for the decision there made. It cites the *Van Ingen* case, referred to herein, as authority for the proposition that in New York only punitive and not compensatory damages may be allowed for mental sufferings in case of defamatory words actionable *per se*, and it relies on the entire absence of any precedent for the allowance of damages for physical sufferings in cases of defamatory words actionable *per se*, and reaches the conclusion that such damages are too remote to be allowed.

As I have shown, the *Van Ingen* case expressly holds that compensatory damages may be allowed in the cases stated for mental sufferings, and I have called attention to authorities directly holding that damages for physical sufferings may be allowed in cases of defamatory words actionable *per se*, and to other authorities holding that a more liberal rule in the allowance of damages prevails where the injurious wrong complained of has been the result of willful, malicious intent, than where it has been the result of mere unintentional negligence. If I have correctly analyzed these authorities and the principles affirmed by them, they destroy the basis for the conclusions which were reached in the *Butler* case and the force of that decision as an authority in this case.

Reaching the conclusion as I, therefore, do, that the

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wife might have recovered damages for the mental distress and physical sufferings caused by the publication of defendant's libel, it follows that plaintiff, as her husband, may maintain this action for loss of society and services. He had a right to these. The services were presumably of pecuniary value to him and any wrong by which he was deprived thereof was a wrong done to his rights and interests for which he may recover damages. *Cregin v. Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192; *Reynolds v. Robinson*, 64 N. Y. 589; *Wilson v. Goit*, cited *supra*; *Olmsted v. Brown*, 12 Barb. 657.

In the *Wilson* case it was assumed that the right of a husband to recover in such a case as this was tested by the right of a wife to recover the damages accruing to her personally for the injuries which caused the loss of services to her husband. In the *Olmsted* case the general principle was affirmed that a husband might recover for loss of services resulting from sickness of the wife caused by slander, recovery there being refused on other grounds. That seems to be the logical and reasonable rule. If the defendant was guilty of wrongful conduct which made it liable to the wife for personal sufferings, it also should be liable to the plaintiff for the loss of his wife's services caused by the same act.

In accordance with these views I recommend that the judgment appealed from be affirmed, with costs, and the question certified to us answered in the affirmative.

CULLEN, Ch. J., HAIGHT, VANN, CHASE and COLLIN, JJ.,
concur; WILLARD BARTLETT, J., not sitting.

Judgment affirmed.

Complaint

Form No. 23

Complaint; Libel; Action by Husband for Loss of Wife's Services
due to Sickness Resulting from Mental Distress Caused by Wil-
ful and Malicious Publication of Words Libelous Per Se¹

Supreme Court, County of New York.

George E. Garrison,	}
Plaintiff,	
against	
Sun Printing and Publishing Association,	
Defendant.	

The plaintiff above named, by Herbert H. Gibbs, his
attorney, complaining of the defendant herein alleges:

FOR A FIRST CAUSE OF ACTION

I. That at all the times hereinafter mentioned plaintiff
was a resident and householder of the City of Newark
in the State of New Jersey.

II. Upon information and belief, that defendant at all
the times hereinafter mentioned was and still is a cor-
poration organized and existing under the laws of the
State of New York and then was and now is the publisher
of a daily newspaper in the Borough of Manhattan,
City of New York, State of New York, called "The Sun,"
which was then and is now widely read and known and
was then and is now widely circulated by mail and other-
wise throughout the said City of Newark and State of

¹ From *Garrison v. Sun Printing and Publishing Ass'n*, 207 N. Y. 1;
aff'g 150 App. Div. 689; 135 Supp. 721; aff'g 74 Misc. 622; 134 Supp.
670. See *ante*, page 267. The same case was before the Appellate
Division on a motion to compel the plaintiff to separately state and
number the causes of action, which motion was granted by the Appel-
late Division. See 144 App. Div. 428; 129 Supp. 448.

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New Jersey and throughout said City of New York and State of New York and elsewhere in the United States of America.

III. That on or about the 22d day of November, in the year One thousand nine hundred and eight at the said City of New York, defendant, contriving and wickedly and maliciously intending to injure plaintiff did falsely, wickedly and maliciously, intentionally and willfully print, publish and widely circulate and did cause to be printed, published and widely circulated in and about the said City of Newark and State of New Jersey, and in and about the said City of New York and State of New York and elsewhere the following false, scandalous and defamatory article of and concerning plaintiff and plaintiff's marital relations in defendant's aforesaid newspaper, called "The Sun," to wit:

The words in headlines,—

"ARCHER CAUGHT IN SEATTLE"

"NEWARK BROKER ACCUSED OF \$47,000 FORGERIES"

"Hunted Since 1902 as Far as South Africa—Working in Seattle as C. Archie Carter—Woman Disappeared When He Did—Says He Is Innocent."

and the words:

"Word was received in Newark yesterday of the arrest at Seattle, Wash., of Elliot A. Archer, wanted in Newark to answer ten indictments for forgeries. He is charged with defrauding the Manufacturers' National Bank and the National Newark Banking Company of \$47,000 on bogus receipts for grain shipments. He disappeared from Newark on August 22, 1902, and a search that extended as far as Cape Town, Africa, has been made for him.

"Archer is alleged to have conducted his forgeries in much the same manner as the Chicago swindler, Van Vlissingen, by means of a glass plate and an electric light for tracings.

* * * * *

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"At the time of Archer's disappearance Mrs. George E. Garrison [meaning plaintiff's wife] of 426 Summer Avenue, also disappeared. Later she wrote to her husband [meaning plaintiff] from Denver that she had been deserted and begged forgiveness. Garrison [meaning plaintiff] sent her money and she returned to the East. She [meaning plaintiff's wife] disappeared a second time and later was heard from as being with Archer on the Pacific Coast.

* * * * *

"In Newark Archer was a member of the North End Club. His wife and two children live at 124 Lincoln Avenue, Newark.

"SEATTLE, WASH., Nov. 21.—Archer has been living with a woman (meaning plaintiff's wife) whom he calls his wife since he came to this city. He was not locked up at the city prison, but was taken direct to the county jail. His arrest followed the receipt of the following telegram from Newark:

"Arrest Elliot A. Archer, employed by the Tacoma Light & Power Company of Seattle. Ten indictments for forgeries aggregating \$70,000. Description: 44 years, 5 feet, 10 inches, 190 pounds, well built, black brown hair, bald on top, brown stubborn moustache, if wearing one; grayish brown eyes; speaks with a lisp; rapid talker. Our circular sent you November, 1904, bears photograph of Archer, who may now use assumed name.

" 'W. A. CARROLL,
" 'Captain of Detectives.' "

IV. That by the words above quoted, which were printed, published and widely circulated by defendant as aforesaid, defendant meant and intended to mean that plaintiff was the husband of an unchaste woman, namely, Rose G. Garrison, who was living in adultery with said Archer, and that said words were so understood by the readers of defendant's said newspaper.

V. On information and belief, that by the law of the State of New York, and by the law of the State of New Jersey, and by the law of the State of California, and by the law of the State of Colorado, and by the law of the State of Washington, the commission of acts of adultery

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does now and at the times mentioned in said publication did constitute a crime, and that by the words above quoted, which were printed, published and widely circulated by defendant, as aforesaid, defendant meant and intended to mean, that plaintiff was the husband of a woman who had committed the crime of adultery in said States of New York, New Jersey, California, Colorado, Washington and elsewhere, and that said words of defendant were so understood by the readers of defendant's said newspaper.

VI. That the article hereinbefore set forth was printed, published and widely circulated as aforesaid in the Sunday edition of the said "The Sun" which, as plaintiff alleges upon information and belief, then had a circulation of about fifty thousand (50,000) copies.

VII. Upon information and belief, that defendant, its servants and agents, wrongfully, negligently and carelessly failed and omitted to make investigation as to the truth of the said article, in so far as the same concerned plaintiff and plaintiff's marital relations, prior to the printing, publication and circulation thereof, and that said article was false, scandalous, and defamatory of plaintiff and was known to the defendant, its servants and agents, so to be, and was printed, published and circulated by defendant as aforesaid unlawfully and in wanton and reckless disregard of plaintiff's rights.

VIII. That by reason of the aforesaid printing, publication and wide circulation of said article, plaintiff has been brought into public scorn, scandal, infamy, contempt and obloquy and has been held up as an object of scorn, shame, contempt and obloquy among the neighbors, friends, associates and acquaintances of plaintiff and of his said wife and among all good and worthy persons and citizens, as the patient, long suffering, forgiving and consenting husband of a bad, unfaithful and adulterous woman; and the neighbors, friends, associates and acquaintances of plaintiff and of plaintiff's said wife and other persons as well, to whom the happiness and comfort of

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plaintiff in his said wife's society and companionship and the goodness, faithfulness and chastity of plaintiff's said wife were unknown, have been caused to suspect and believe and to still suspect and believe, of and concerning plaintiff, that he was the shameless, contemptible and cowardly husband of a bad and unfaithful woman who had eloped with one Elliot A. Archer, and had been the intimate associate of said Archer, and had had improper and questionable relations with said Archer, and had been guilty of adultery and of lewd and lascivious conduct with said Archer and had passed herself off upon the public as the wife of said Archer, described in said articles as a forger, a thief and a fugitive from justice, and to suspect and believe and to still suspect and believe that plaintiff was the husband of a woman who was subject to the pains and penalties of the laws of the State of New Jersey and of other States, against persons guilty of such offenses; and plaintiff has been and still is shunned and avoided by his neighbors, friends, associates and acquaintances and by good and worthy persons and citizens, who have refused and do still refuse to have any friendship, transaction or business dealing with plaintiff as they were before used and accustomed to have, and otherwise would have had, whereby plaintiff has been and still is greatly injured in his good name, fame and credit and plaintiff has been deprived of tenants of his house at No. 436 Summer Avenue, in said City of Newark, and has lost the rent of apartments in said house for several months and sundry persons refused to become tenants of plaintiff's said house.

IX. That by reason of the premises and of the aforesaid wrongful, unlawful and malicious act of the defendant in printing, publishing and circulating the aforesaid false, scandalous, malicious and defamatory libel of and concerning plaintiff and plaintiff's marital relations, plaintiff has been greatly injured, to his damage in the sum of Ten thousand dollars (\$10,000).

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FOR A SECOND CAUSE OF ACTION

X. That at all the times hereinafter mentioned and prior thereto, plaintiff's wife Rose G. Garrison, who at all such times resided and does now reside with plaintiff her husband, at the City of Newark, County of Essex and State of New Jersey, and that at such times plaintiff was a householder at said City of Newark and at all the times herein mentioned supported and provided for his said wife.

XI. That prior to the times hereinafter mentioned, plaintiff's said wife was in good health and was capable of performing and did actually perform all the duties of housekeeper in plaintiff's dwelling for plaintiff, her said husband, and in the care and management of plaintiff's household.

XII. Upon information and belief, that defendant at all the times hereinafter mentioned was and still is a corporation organized and existing under the laws of the State of New York and then was and is now the publisher of a daily newspaper in the Borough of Manhattan, City of New York, State of New York, called "The Sun," which was then and is now widely read and known and was then and is now widely circulated by mail and otherwise throughout the said City of Newark and State of New Jersey and throughout said City of New York and State of New York and elsewhere in the United States of America.

XIII. That on or about the 22d day of November, in the year One thousand nine hundred and eight at the said City of New York, defendant, contriving and wickedly and maliciously intending to injure plaintiff did falsely, wickedly and maliciously, intentionally and willfully print, publish and widely circulate and did cause to be printed, published and widely circulated in and about the said City of Newark and State of New Jersey, and in and about the said City of New York, and State of New

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York and elsewhere the following false, scandalous and defamatory article of and concerning plaintiff's said wife in defendant's aforesaid newspaper, called "The Sun," to wit:

The words in headlines:

"ARCHER CAUGHT IN SEATTLE

"NEWARK BROKER ACCUSED OF \$47,000 FORGERIES

"Hunted Since 1902 as Far as South Africa—Working in Seattle as C. Archie Carter—Woman Disappeared When He Did—Says He Is Innocent."

and the words:

"Word was received in Newark yesterday of the arrest at Seattle, Wash., of Elliot A. Archer, wanted in Newark to answer ten indictments for forgeries. He is charged with defrauding the Manufacturers' National Bank and the National Newark Banking Company of \$47,000 on bogus receipts for grain shipments. He disappeared from Newark on August 22, 1902, and a search that extended as far as Cape Town, Africa, has been made for him.

"Archer is alleged to have conducted his forgeries in much the same manner as the Chicago swindler, Van Vlissingen, by means of a glass plate and an electric light for tracings.

* * * * *

"At the time of Archer's disappearance Mrs. George E. Garrison [meaning plaintiff's wife] of 426 Summer Avenue also disappeared. Later she wrote to her husband [meaning plaintiff] from Denver that she had been deserted and begged forgiveness. Garrison [meaning plaintiff] sent her money and she returned to the East. She [meaning plaintiff's wife] disappeared a second time and later was heard from as being with Archer on the Pacific Coast.

* * * * *

"In Newark Archer was a member of the North End Club. His wife and two children live at 124 Lincoln Avenue, Newark.

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"SEATTLE, WASH., Nov. 21.—Archer has been living with a woman [meaning plaintiff's wife] whom he calls his wife since he came to this City: He was not locked up at the city prison, but was taken direct to the county jail. His arrest followed the receipt of the following telegram from Newark:

" 'Arrest Elliot A. Archer, employed by the Tacoma Light & Power Company of Seattle. Ten indictments for forgeries aggregating \$70,000. Description: 44 years, 5 feet, 10 inches, 190 pounds, well built, black brown hair, bald on top, brown stubborn mustache, if wearing one; grayish brown eyes; speaks with a lisp; rapid talker. Our circular sent you November, 1904, bears the photograph of Archer, who may now use assumed name.

" 'W. A. CARROLL,

" 'Captain of Detectives.' "

XIV. That by the words above quoted, which were printed, published and widely circulated by defendant as aforesaid, defendant meant and intended to mean that plaintiff's wife was and had been unchaste, and meant to and did charge plaintiff's wife with living in adultery with said Archer, and was so understood by the readers of defendant's said newspaper.

XV. On information and belief that by the law of the State of New York, and by the law of the State of New Jersey, and by the law of the State of Colorado, and by the law of the State of Washington, the commission of acts of adultery, constitute a crime, and that by the words above quoted, which were printed, published and widely circulated by defendant as aforesaid, defendant meant and intended to mean that plaintiff's wife had committed the crime of adultery in the States of New York, New Jersey, Colorado, Washington and elsewhere, and was so understood by the readers of defendant's said newspaper.

XVI. That the article hereinabove set forth was printed, published and widely circulated as aforesaid in the Sunday edition of the said "The Sun" which, as plaintiff alleges upon information and belief, then had a circulation about fifty thousand (50,000) copies.

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XVII. Upon information and belief, that defendant, its servants and agents, wrongfully, negligently and carelessly failed and omitted to make investigation as to the truth of the said article, in so far as the same concerned plaintiff's said wife, prior to the printing, publication and circulation thereof, and that said article concerning plaintiff's said wife was false, scandalous, malicious and defamatory of plaintiff's said wife and was known to the defendant, its servants and agents, so to be, and was printed, published and circulated by defendant as aforesaid unlawfully and in wanton and reckless disregard of plaintiff's marital rights.

XVIII. That by reason of the aforesaid printing, publication and wide circulation of said article plaintiff's said wife was shocked and distressed and became and now is ill and sick and was and is now physically and mentally disordered and distressed and for a long time was wholly unable to perform her duties as plaintiff's housekeeper and as plaintiff's wife and is not now, and, as plaintiff alleges upon information and belief, will not for a long time to come be as well, strong and able to perform her said duties as before the printing, publication and circulation of said false, scandalous, malicious and defamatory article, and plaintiff has been deprived of the services of his said wife and his comfort and happiness in her society and companionship have been impaired, and, as plaintiff alleges upon information and belief, such deprivation and impairment will necessarily continue for a long time to come, and plaintiff was necessarily obliged to and did employ medical aid and attendance in and about the care and attempted cure of his said wife, and was obliged to and did incur, pay, lay out and expend large sums of money therefor and for medicines, and as plaintiff alleges upon information and belief, he will hereafter necessarily be obliged to incur and expend other large sums therefor, and plaintiff was necessarily obliged to and did give up housekeeping to live at a hotel and in boarding houses, and

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was obliged to and did for a time give up his vocation in order to devote himself to the care and attempted cure of his said wife, to his further loss and damage.

XIX. That by reason of the premises in this, plaintiff's second cause of action, set forth, and by reason of the aforesaid wrongful, unlawful and malicious acts of the defendant in printing, publishing and circulating the aforesaid false, scandalous, malicious and defamatory libel of and concerning plaintiff's said wife, plaintiff had been further damaged in the sum of Five thousand dollars (\$5,000).

WHEREFORE plaintiff demands judgment against the defendant for the sum of Fifteen Thousand dollars (\$15,000), together with the costs and disbursements of this action.

HERBERT H. GIBBS,
Attorneys for Plaintiff,
Office & P. O. Address,
76 William Street,
Borough of Manhattan,
City of New York, N. Y.

[*Verification.*]

ANTON V. SCHWEITZER, Plaintiff, v. THE HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN GESELLSCHAFT (otherwise HAMBURG-AMERICAN LINE), Defendant.¹

(Supreme Court, Kings County Trial Term, December, 1912)

Conflict of laws; enforcement by New York courts of German Workmen's Compensation Act when German subject, on German vessel, employed for round trip, is injured while ship is in New York harbor

1. Where the plaintiff, a German subject, was employed by the defendant, a German corporation, for a voyage from Ham-

¹ For answer from this case see *post*, page 290. See also note *post*, page 291.

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burg, Germany, to New York and return, and it appeared that under the German Workmen's Compensation Act that both employer and employé were bound by the terms of that Act as a condition of entering into the contract of employment: *Held*, that where an accident occurred to the employé while the ship was in New York Harbor that his exclusive remedy was under the German Workmen's Compensation Act, which was pleaded in the answer and proved at the trial, and that a verdict in favor of the plaintiff in a tort action for personal injuries on the ground of negligence should be set aside.

The plaintiff, a German subject, was employed by the defendant, a German corporation, at Hamburg, Germany, on one of the defendant's ships for the voyage to New York and return. While the ship was in New York Harbor as a result of a defect in the windlass the plaintiff was injured and secured a verdict for damages on the ground of the defendant's negligence. The defendant, for a complete defense and bar pleaded and proved at the trial the Workmen's Compensation Law of the Empire of Germany. The parties agreed upon the trial that the court should reserve a consideration of the scope and effect of the German Law until after verdict and should then dispose of it as a question at law if the plaintiff prevailed before the jury.

Charles V. Nellany for the plaintiff.

A. Leonard Brougham for the defendant.

KAPPER, J.:

The Appellate Division decision herein (149 App. Div. 900; 134 Supp. 812), upon the appeal from the order denying the defendant's motion to compel a reply to the separate defense contained in its answer, that the employé's compensation law of the Empire of Germany was a bar to the maintenance of this action, rules that such defense should be replied to. This decision seems to

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me to hold, in effect, that the law, if proved, would constitute a complete defense. This law as proved upon the trial is even more comprehensive than the statement of it quoted from the answer by Mr. Justice BURR who wrote for the Appellate Division. It is now shown not alone that the law provides as the exclusive remedy for an employé injured either through his master's negligence or the hazards of the service a resort to the fund created by the sea accident insurance law of Germany, but, further, that such fund is the creation of mutual contributions of both employer and employé under and pursuant to such law, and that it is only under the terms of the law that the employé is taken into and permitted to enter upon the employer's service. If it is ever to be held in a master and servant negligence action that the *lex loci contractus* which is foreign to the forum is to prevail, notwithstanding the action is *ex delicto* and is brought in the forum where the cause of action arose, this seems to me to be that case. It has been said that when as in case of a carrier and passenger, or a master and servant, the relation between the wrongdoer and the injured person had its inception in a contract, there is a difference of opinion as to whether the law of the place where the contract was made, or that of the place where the injury occurred, prevails. 2 Whart. Confl. Laws (3d ed.), 1103. Whatever conflict of authority there may be upon the question, it must be fairly regarded as determined in New York that the law of the place of the making of the contract, and not the law of the forum, governs. This was held in a case of passenger and carrier where the only contract was the purchase by a passenger of his railroad ticket (*Dyke v. Erie R. Co.*, 45 N. Y. 113); and in a case of servant against master, where the cause of action was defended upon the ground that a statute of Pennsylvania which made the particular act of negligence in question that of a fellow servant and nonactionable was a complete defense; the court there holding that the relationship of master and

servant was *contractual* and that as Pennsylvania was "the place of the contract" its law, and not the law of the forum, controlled. *Voshefskey v. Hillside Coal & Iron Co.*, 21 App. Div. 168; 47 Supp. 386. Wharton (*supra*, 1105) sets forth a like view in the statement that "any defense based upon the express terms of the contract is governed by the *lex loci contractus*, even though the action is *ex delicto*."

In the *Dyke* case, *supra*, 117, the court says: "It cannot be assumed that the parties intended to subject the contract to the laws of the other States, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those States and the *lex loci contractus*. * * * Whether the actions are regarded as actions of assumpsit upon the contracts, or as actions upon the case for negligence, the rights and liabilities of the parties must be judged by the same standard. The form of the action concerns the remedy, but does not affect the legal obligations of the parties. In either form of action the liability of the defendants, and the rights of the plaintiffs, are based upon the contracts. The defendant owed no duty to the plaintiffs, except in virtue of the contracts and the obligations for the violation and breach of which, an action may be brought are only coextensive with the contracts made." The *Dyke* case, *supra*, which, as we have seen, was an action for personal injuries, has been applied or approvingly cited in a number of cases in our State in suits brought to recover against a carrier for loss of baggage or goods, it being held that the relationship was contractual and the *lex loci contractus* governed. *Curtis v. Delaware, Lack. & W. R. R. Co.*, 74 N. Y. 116, 120; *China Mut. Ins. Co. v. Force*, 142 id. 90, 100; *Grand v. Livingston*, 4 App. Div. 589, 594; 38 Supp. 490; *Valk v. Erie R. R. Co.*, 130 App. Div. 446, 449; 114 Supp. 964. Unless, therefore, the adoption, application and enforcement of the German law governing the plaintiff's employment would be contrary to the policy and fundamental laws of the State, I should

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say that the defense ought to prevail. The case of *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, is suggested as establishing a policy upon the part of the State of New York against the enforcement of a compulsory workmen's compensation act exclusive in character as is the German law in the case at bar. But that case did not so hold, for all that was there decided was that where the legislature sought to impose on an employer engaged in a lawful business a liability for injury suffered by his employé in the course of the employment and due to no fault or negligence whatever upon the part of the employer, such an attempted law was a taking of the employer's property without due process of law. The court did not for a moment hold that it was not competent for employer and employé to agree to a compensation scheme in lieu of a right of action for damages. Nor has it ever been so held, so far as I know. In fact, we have now in this State an act whereby employer and employé may so contract (Laws of 1910, chap. 352). A foreign law to which both employer and employé, engaged in interstate and foreign commerce and transportation, have subscribed and upon the basis of which the contract of employment was made and entered into, where the cars or ships of the employer enter our State and in or upon which while within our borders an accident occurs to the employé through his employer's negligence, particularly where the contract of employment provides for a fixed compensation in case of specified injury to take the place of a right of action at law and which is lawful both in the place where made and that in which the cause of action arose, should obtain recognition and enforcement here. To hold otherwise works not for benefit, but rather injury to our interstate and foreign commerce.

In *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, Mr. Justice GRAY (p. 448) quotes from the case of *Peninsular & Oriental Steam Nav. Co. v. Shand*, 3 Moore P. C. (N. S.) 272, 290, as follows: "The

Answer

general rule is that the law of the country where a contract is made governs as to the nature, the obligation and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations."

The conclusion is reached that the German law is a bar to the maintenance of this action, and the motion to set aside the verdict and for a new trial is granted.

Motion granted

Form No. 24

Answer Setting up German Workmen's Compensation Act as a Defense to an Action for Damages for Negligence where the Plaintiff was a Seaman on a German Vessel and the Accident took Place while the Vessel was in New York¹

Supreme Court, Kings County.

<p>Anton V. Schweitzer, Plaintiff, against Hamburg Amerikanische Pack- etfahrt-Actien Gesellschaft (otherwise known as the Ham- burg-American Line), Defendant.</p>	}	No. 4.
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The defendant above named, for its answer to the plaintiff's amended complaint herein:

¹ From *Schweitzer v. Hamburg-American Line*, ante, page 285; 78

Answer

I. Denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Subdivision V of said amended complaint.

II. Denies on information and belief the allegations contained in Subdivisions II, III and IV of said amended complaint.

III. And further answering said amended complaint and for a first defense thereto, the defendant alleges, on information and belief, that in and about the months of July and August in the year 1906, the plaintiff was employed as a member of the crew on board the defendant's steamship Pretoria which said steamship was a German seagoing vessel sailing under the German flag from the port of Hamburg in the Empire of Germany to the port of New York, the plaintiff having duly entered into a contract of employment as a member of said steamship

Misc. 448; 138 Supp. 944, in which a motion was granted setting aside a verdict for the plaintiff, on the ground that the parties were bound by the German Workmen's Compensation Act as it appeared that the plaintiff was a German subject and the defendant was a German corporation at the time the contract of employment was entered into.

This answer was before the Appellate Division in 149 App. Div. 900; 134 Supp. 812, in which case the court required the plaintiff to reply to the new matter in the answer setting up the foreign statute.

See the case of *Albanese v. Stewart*, 2 BRADBURY'S PL. & PR. REP. 189, and also the answer interposed in that case *id.*, p. 193. In the last-mentioned case the court held that the plaintiff was bound by the terms of the New Jersey Workmen's Compensation Act, where the injury occurred in New Jersey, and overruled a demurrer to the answer setting up the New Jersey Workmen's Compensation Act as a defense to an action for damages for personal injuries caused by negligence.

See also the case of *Pensabene v. Auditore Co.*, 2 BRADBURY'S PL. & PR. REP. p. 197, and the same case in the Appellate Division, *id.* 212, in which the Appellate Division held that a complaint under the New Jersey Workmen's Compensation Act was fatally defective without an allegation that the contract of employment was entered into in New Jersey.

See also *Sexton v. Newark District Telegraph Co.*, 2 BRADBURY'S PL. & PR. REP. p. 221, and NOTE ON PRESENT STATUS OF WORKMEN'S COMPENSATION LAWS IN THE UNITED STATES. *Id.* 240.

Answer

within the Empire in Germany and in accordance with the laws of the Empire of Germany, under and in pursuance of which it was competent for the plaintiff to enter into such contract of employment; that at the time of entering into said contract, the plaintiff was a resident of the German Empire and a subject of the Emperor of said Empire of Germany; that the defendant then was and still is a resident of the Empire of Germany and a subject of said Emperor; that the said contract of employment provided that the plaintiff should serve as a member of the crew on board the defendant's said steamship Pretoria during the voyage of said steamship from the port of Hamburg in said Empire of Germany to the port of New York and return; that the laws of the Empire of Germany then and now in force applied to, regulated and governed the plaintiff and the defendant in the making of said contract and in the performance thereof, and applied, regulated and governed the mutual rights and liabilities of the plaintiff and the defendant growing out of their relation so established during the entire voyage of said steamship from Hamburg to New York and return as aforesaid; that the laws of the Empire of Germany then and still in force applying to, regulating and governing the rights, duties and liabilities of persons serving as members of the crew of German seagoing vessels sailing under the German flag and applying to, governing and regulating the rights, duties and liabilities of persons owning, controlling, or operating German seagoing vessels sailing under the German flag, and applying to, governing and regulating the rights, duties and liabilities of persons having charge of such vessels and having and exercising authority over the members of the crew thereon, are and were, in some material respects, different from the laws of the State of New York and of the United States applying to, regulating and governing similar matters and different from the common law as understood and applied to similar matters in the courts of record of this State.

Answer

That during the said voyage and while the plaintiff was engaged in the performance of his duties as a member of the crew on board of said vessel and before the said vessel had completed the part of its said voyage bringing it to the port of New York, and before the said vessel had entered at the port of New York in accordance with the laws of the United States, the plaintiff sustained an injury to the calf of one of his legs while engaged in assisting other members of the crew to stow the anchor chain in the chain locker in the hold of said vessel; that at the time the said injury was sustained by the plaintiff, neither he nor the defendant was within the jurisdiction of or subject to the law of the United States or the law of any one of the United States applying to or governing the status of master and servant and neither the plaintiff nor the defendant acquired or lost any rights or incurred or became absolved from any liabilities respecting one another, under or by virtue of such law, by reason of the physical presence of the said vessel within the territorial limits of the United States at the time when said injury was sustained by the plaintiff, or by reason of any other matter or thing, but, on the contrary, both the plaintiff and the defendant were at that time solely within the jurisdiction of, subject to, and bound by, the law of the Empire of Germany, and the mutual rights, duties and liabilities of the parties hereto, with respect to one another at that time were not governed, regulated or determined by the law of the United States or by the law of any of the United States or by the common law as understood and applied in the courts of this State; but were and are governed, regulated and determined by the law of the Empire of Germany, which is the law of the flag under which the said vessel was then and there sailing; that at all the times when the plaintiff was upon the said steamship, and at the time when he entered the contract aforesaid and at the time when he sustained the injury aforesaid, it was and now is the law of the Empire of Germany that persons who are employed

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on board of a German seagoing vessel sailing under the German flag, as members of the crew, or in any capacity whatever, and who while on board such vessel in pursuance of such employment or in consequence thereof, sustain personal injuries by reason of any cause whatsoever, shall have no right to claim, receive, sue for or recover any compensation from the owner of such vessel, or from any person connected with or responsible for the management or operation of such vessel, for the injuries so sustained, or for the damage arising therefrom, unless it shall have been determined by the judgment of a court of competent criminal jurisdiction, that the injuries were willfully or intentionally caused by the person against whom such claim is made or suit brought; that the plaintiff's injuries were not willfully or intentionally caused by the defendant or by any person for whose acts or omissions the defendant is responsible, and it has not been determined by any court or authority that said injuries were caused willfully or intentionally by the defendant or by any other person; that at all of the times aforesaid, it was and now is the law of the Empire of Germany that a person who is employed on board a German seagoing vessel sailing under the German flag, as a member of the crew, or in any capacity whatever, and who sustains personal injuries through the carelessness or lack of care on the part of, or any neglect of any duty owed by, the owner of such vessel or the person or persons engaged in, or responsible for, the management or operation of such vessel, shall have the right to claim and receive compensation for such injuries and the damage arising therefrom, exclusively from the society organized and existing under and in pursuance of the Sea Accident Insurance Law of the Empire of Germany and known as the "see-Berufsgenossenschaft," the sole object, purpose and duty of which it is, as is provided by said law (which was duly enacted by the lawmaking power of the Empire of Germany on or about June 30, 1900, and duly promulgated on

Answer

July 5, 1900, in the German Imperial Gazette (at pages 716 *et seq.*), to indemnify all persons employed on German sea-going vessels, in any capacity whatsoever, against damages sustained by reason of personal injuries occurring to them while on board such vessels, or while acting in the service thereof in any place, no matter how such injuries may be caused, whether by the act or omission or lack of care of any person, or by "Act of God" or by any other thing whatsoever, excepting only an act or omission of the person himself calculated or intended to occasion self-injury, provided such injuries be not sustained while the person injured is engaged in committing a crime, and that the ship owner or other person responsible for the management or operation of such vessel is not in any way liable to him therefor, and that no cause of action could accrue to the plaintiff herein against the defendant herein by reason of the matters and things set forth in his amended complaint in this action; and that, therefore, the said amended complaint does not state facts sufficient to constitute a cause of action against the defendant herein.

IV. And further answering said amended complaint and for a Second Defense thereto, the defendant realleges all of the matters and things set forth in its first separate defense herein, and further alleges on information and belief that under and by virtue of the treaty existing between the United States of America and the Empire of Germany, which by virtue of the Constitution of the United States is the supreme law of the land, this Court has no jurisdiction of the subject of this action.

V. And further answering said amended complaint, and for a Third Defense thereto, the defendant alleges on information and belief that the plaintiff voluntarily assumed the risk of injury which appertained to the work of heaving the anchor of said ship Pretoria and stowing the anchor chain in the chain locker thereon, in the manner and by the means employed on said ship for that purpose at the time when he was injured, and, with full knowledge

Statement of the Case

of the operation of the machinery employed therein and with full knowledge of the manner employed in heaving said anchor and stowing said chain, the plaintiff voluntarily placed himself in a position of known danger and sustained his injury thereby and in consequence thereof.

WHEREFORE, the defendant demands judgment that the plaintiff's amended complaint be dismissed with costs.

PERCY S. DUDLEY,
Attorney for Defendant,
26 Liberty Street,
New York City.

[*Verification.*]

In the Matter of the Application of HARRY VOORHIES,
Respondent, for an Order Cancelling Certain Judgments, GEORGE W. ELLIS, Appellant.¹

(207 N. Y. 690; aff'g without opinion 150 App. Div. 904; 135 Supp. 1148, no opinion)

**Discharge of judgment against bankrupt under Debtor and
Creditor Law, § 150**

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered

¹ For the following papers from this case see pages indicated below: Notice of motion, page 298; petition, page 300; certificate of bankrupt's discharge, page 302; order discharging judgment, page 303.

The judgment which was discharged in this case was based on a former judgment in an action for personal injuries to the plaintiff by reason of the discharge of a gun by the defendant. The judgment creditor contended that the judgment was one of those excepted in section 17 of the Bankruptcy Act which provides: "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as * * * are liabilities for * * * wilful and malicious injuries to the person or property of another * * *"

The original judgment was for \$4,917.39, and was entered on December 4th, 1888. Before the judgment became barred by the Statute of Limitations an action was brought thereon resulting in a judg-

Statement of the Case

April 26th, 1912, which affirmed an order of Special Term cancelling and discharging of record, under § 150 of the Debtor and Creditor Law, a judgment against the respondent herein, a discharged bankrupt.

ment including interest and costs of \$10,722.76, which was entered on May 22, 1903.

The judgment creditor contended that the judgment came within the provisions of the Bankruptcy Act by reason of the following paragraph in the complaint:

"That the plaintiff is by trade a carpenter, and that while the plaintiff was lawfully working at his trade upon a house situate on Brighton Place at Coney Island, the defendant on or about the 26th day of January, 1881, without any justification or provocation whatever, having in his hands a gun, wantonly and recklessly discharged the same near said house and some of the contents of the gun, in consequence of such discharge thereof, by the defendant, passed out of the said gun in the direction where the plaintiff was, and struck the plaintiff in his left eye, causing the plaintiff great suffering and injury and the loss of said eye of the plaintiff."

It was contended that the words "wantonly and recklessly" as employed in the complaint were equivalent to the words "wilful and malicious" as used in section 17 of the Bankruptcy Act.

The bankrupt contended that before the trial in the original action the judgment creditor's attorney, who was the only person contesting the discharge, served on the defendant's attorney a notice to the effect that:

"Plaintiff expects to prove under the allegations of his complaint, among other things pertinent to the issue, not only the absence of contributory negligence on his part, but also such negligence and want of reasonable care on the part of the defendant, in firing off his gun on the occasion referred to in the complaint, as directly caused the loss of plaintiff's eye, with the attendant pain, expense, injury and loss."

It was contended that this was in effect a bill of particulars which limited the plaintiff's claim and that the words "wantonly and recklessly" as used in the complaint were conclusions of law. The judgment debtor contended that proof that an act was wantonly and recklessly done did not necessarily imply that it was done willfully and maliciously, and cited in this connection: *Tompkins v. Williams*, 23 Amer. Bankruptcy Rep. 886; *Tinker v. Colwell*, 193 U. S. 473, 489; *Highland Avenue & B. R. Co. v. Robinson*, 125 Ala. 483. The judgment debtor also contended that the new judgment was on a contract and not on a tort inasmuch as it was founded on a prior judgment, and cited in this

 Notice of Motion

Alton B. Parker and George W. Simpson for appellant.

Allen S. Wrenn for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., WILLARD BARTLETT, HIS-
COCK, CHASE, COLLIN and HOGAN, JJ. Dissenting:
WERNER, J.

 Form No. 25

Notice of Motion; Motion to Discharge Judgment against Bankrupt
under Debtor and Creditor Law, § 150¹

Supreme Court, County of New York.

In the Matter of the Applica-
tion of Harry Voorhies, a
discharged bankrupt, for an
order cancelling certain judg-
ments against him under § 150
of the Debtor and Creditor
Law (Consolidated Laws,
Chapter 12).

TAKE NOTICE, that upon the annexed petition and cer-
tificate of discharge (copies of which are herewith served
connection *Humphrey v. Persons*, 23 Barb. 313; *Cameron v. Young*,
6 How. Pr. 372.

The judgment creditor, however, contended that the character of
the judgment, so far as the right to a discharge was concerned, was to
be determined from the original cause of action, and cited *Wyman v.*
Mitchell, 1 Cow. 316; *Wisconsin v. Pelican Insurance Co.*, 127 U. S.
265.

No opinion is expressed by any of the courts through which the case
passed on any of these questions.

¹ From *Matter of Voorhies*, 207 N. Y. 690; aff'g without opinion 150
App. Div. 904; 135 Supp. 1148; no opinion. See *ante*, page 296. See
petition, *post*, page 300; certificate of discharge, *post*, page 302; and
order of discharge, *post*, page 303.

Notice of Motion

upon you), I will move this Court at a Special Term, Part I, for the hearing of Motions thereof, to be held at the County Court House in the Borough of Manhattan, New York City, on the 5th day of December, 1911, at 10:30 o'clock A. M., or so soon thereafter as counsel can be heard, for an order directing the Clerk of the County of New York to cancel certain judgments, the particulars of which are fully set forth in the annexed petition, against Harry Voorhies (petitioner), a discharged bankrupt, under § 150 of the Debtor and Creditor Law (Consolidated Laws, Chapter 12)

Dated, November 29th, 1911.

Yours, &c.,
LOUIS LAFRANCE,
Attorney for Petitioner,
16 Court Street,
Borough of Brooklyn,
New York City.

To

GEORGE W. ELLIS, Esq.,
Attorney for Judgment-
Creditors of Record,
Arthur Samuels & George W. Ellis.
LOUIS J. ROSSETT, Esq.,
Attorney for Judgment-
Creditor of Record,
Samuel Abeloff.

Form No. 26

**Petition; Motion to Discharge Judgment against Bankrupt under
Debtor and Creditor Law, § 150¹**

Supreme Court, New York County.

In the Matter of the Application of Harry Voorhies, a discharged bankrupt, for an order cancelling certain judgments against him under § 150 of the Debtor and Creditor Law (Consolidated Laws, Chapter 12).

To the Supreme Court of the State of New York:

THE PETITION of Harry Voorhies respectfully shows to this court:

I. That on the 12th day of July, 1910, your petitioner filed in the office of the Clerk of the District Court of the United States for the Eastern District of New York, a petition in bankruptcy together with schedules of his assets and a list of his creditors and all his liabilities.

II. That on the said 12th day of July, 1910, your petitioner was duly adjudicated a bankrupt by said Court.

III. That on the 19th day of October, 1910, your petitioner made application to said Court for an order praying for his discharge.

That on the 25th day of November, 1910, the return day of said application, there being no opposition, a discharge was granted to said bankrupt (your petitioner)

¹ From *Matter of Voorhies*, 207 N. Y. 690, aff'g without opinion 150 App. Div. 904; 135 Supp. 1148, no opinion. See *ante*, page 296. See notice of motion, *ante*, page 298; certificate of discharge, *post*, page 302; order of discharge, *post*, page 303.

Petition

from all his debts (as set forth in his schedules) under the Bankrupt Act. That hereto annexed is a Certificate of such discharge. That more than one year has elapsed since such discharge was granted as appears by said certificate.

IV. That included in the schedules of liabilities and fully set forth therein, filed by your petitioner, are two judgments recorded against your petitioner, viz.: Arthur Samuels and George W. Ellis, plaintiffs, against Harry Voorhies, defendant (petitioner), Supreme Court, New York County, Perfected May 22, 1903, Docketed in Kings County, May 23, 1903, amount \$10,722.16, Attorney, George W. Ellis; Samuel Abeloff, plaintiff, against Harry Voorhies, defendant (petitioner), Municipal Court, Borough of Manhattan, New York City, Thirteenth District, Perfected June 23, 1904, Docketed in Kings County, July 29, 1904; amount \$105.42. Louis J. Rossett, Attorney.

V. That your petitioner further shows that the judgments above set forth were founded upon the following facts, viz.: the judgment first above set forth was recovered in an action brought to renew a former judgment obtained in an action brought to recover damages for personal injuries sustained by plaintiff Arthur Samuels, which judgment was recovered in said Court October 17, 1883, against your petitioner for \$4,917.39, one-third of which judgment was assigned by Arthur Samuels to George W. Ellis; the judgment second above set forth was obtained in an action to recover for goods sold and delivered.

VI. That said judgments were not founded upon fraud or for obtaining property by false pretenses or false representations or for willful or malicious injuries to the person or property of another, which are excluded from the operation of a discharge under the Bankrupt Act.

WHEREFORE, your petitioner prays for an order directing the clerk of the County of New York to cancel and discharge of record the judgments against your petitioner

Certificate of Bankrupt's Discharge

as fully set forth above in accordance with § 150 of the Debtor and Creditor Law (Consolidated Laws, Chapter 12).

HARRY VOORHIES.

[*Verification.*]

Form No. 27

Certificate of Bankrupt's Discharge; Motion to Discharge Judgment against Bankrupt under Debtor and Creditor Law, § 150¹

District Court of the United States, }
Eastern District of New York, } ss:

WHEREAS, Harry Voorhies, of Brooklyn, in the County of Kings and State of New York, in said District, has been duly adjudged a BANKRUPT, under the Acts of Congress relating to Bankruptcy, and appears to have conformed to all the requirements of law in that behalf,

IT IS THEREFORE ORDERED by this Court that said Harry Voorhies be discharged from all debts and claims which are made provable by said Acts against his estate, and which existed on the 12th day of July A. D. 1910, on which day the petition for adjudication was filed by him excepting such debts, as are by law excepted from the operation of a discharge in bankruptcy.

WITNESS, the Hon. Thomas I. Chatfield, Judge of said District Court and the seal thereof this 25th day of November A. D. 1910.

MILARD P. MORLE,
Clerk.

L. S.

¹ From *Matter of Voorhies*, 207 N. Y. 690; aff'g without opinion 150 App. Div. 904; 135 Supp. 1148, no opinion. See *ante*, page 296. See notice of motion, *ante*, page 298; petition, *ante*, page 300; order of discharge, *post*, page 303.

Order

Form No. 28

Order; Motion to Discharge Judgment against Bankrupt under
Debtor and Creditor Law, § 150 ¹

At a Special Term of the Supreme Court held at the
Court House in the Borough of Manhattan, New York
City, on the 5th day of February, 1912.

Present: Hon. JOHN FORD, *Justice*.

In the Matter of the Application
of Harry Voorhies, a discharged
bankrupt, for an order can-
celling a certain judgment
against him under § 150 of the
Debtor and Creditor Law (Con-
solidated Laws, Chapter 12).

Upon reading the Notice of Motion dated November 29, 1911, the petition of Harry Voorhies, verified November 28, 1911, certified copy order discharging the aforesaid Harry Voorhies from all his debts under the bankrupt act, and on reading proof of due service of copies of aforesaid notice of motion, order and petition upon the attorney of record, who obtained said judgment, and the affidavit of George W. Ellis, sworn to December 4th, 1911, and the affidavit of Louis Lafrance, sworn to December 5, 1911, in answer thereto and after hearing Louis Lafrance, attorney for said Harry Voorhies, petitioner, in support of said motion and George W. Simpson, attorney for George W. Ellis in opposition,

Now, on motion of Louis Lafrance, attorney for Harry Voorhies, it is ordered that the following judgment, viz.:

¹ From *Matter of Voorhies*, 207 N. Y. 690; aff'g without opinion 150 App. Div. 904; 135 Supp. 1148, no opinion; see *ante*, page 296. See notice of motion, *ante*, page 298; petition, *ante*, page 300; certificate of discharge, *ante*, page 302.

Statement of the Case

Arthur Samuels and George W. Ellis, plaintiffs against Harry Voorhies, defendant (petitioner), Supreme Court, New York County, perfected and filed in New York County Clerk's office, May 22d, 1903, docketed in Kings County Clerk's office, May 23d, 1903, amount, \$10,722.16, attorney George W. Ellis, be cancelled and discharged of record, and the Clerk of the County of New York is hereby directed to mark accordingly upon the docket in his office the cancellation and discharge of the aforesaid judgment against said Harry Voorhies.

Enter,
JOHN FORD,
Justice Supreme Court.

ELMER E. ALEXANDER et al., co-partners doing business under the firm name and style of DAVIS, REID & ALEXANDER, Respondents, v. AMERICAN ENCAUSTIC TILING COMPANY (Limited), Appellant.¹

(207 N. Y. 276; aff'g 144 App. Div. 931; 129 Supp. 1111, no opinion)

Patents; royalties; license to sell patented combination; selling separately an essential part of combination; evidence; laying foundation for material and competent questions by asking those which are immaterial and incompetent; trial; submission of case to jury; when waived

1. Under a contract whereby the defendant agrees to pay royalties on a combination of certain articles, he is guilty of in-

¹ For complaint from this case see *post*, page 313, to which is attached the agreement on which the action was based.

A complaint in which an accounting is demanded for royalties under a license issued on a patent is demurrable as no trust or fiduciary relation exists between the parties; and this is so even though as an incident to the action it may be necessary to have an accounting to determine the amount due. *Moore v. Coyne*, 113 App. Div. 52; 98 Supp. 892; *Storr v. Central Bedding Co.*, 55 Misc. 398; 106 Supp. 546.

For complaint in action for royalties under a patent, from *United States Aluminum Printing Plate Co. v. Stecher Lithographic Co.*, 110 App. Div. 887; 96 Supp. 1149, see 1 BRADBURY'S FORMS OF PL. 776.

Opinion of the Court

fringement and a violation of the agreement by selling an essential part of the combination without paying royalties thereon.

2. Where, upon the plaintiff's counsel asking for a direction of a verdict the defendant's counsel does not make any objection but expressly concedes that under the ruling of the court and the judge's theory of the case there is nothing to go to the jury, the right to go to the jury is waived.
3. A party may not lay the foundation for material and competent questions by asking those which are immaterial and incompetent.

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 24, 1911, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court, and also affirming an order of Special Term sustaining a demurrer to separate defenses and counterclaims set up in the amended answer.

Charles F. Brown, Charles A. Flammer and Ralph M. Frink for appellant.

J. Ard Haughwout for respondents.

HISCOCK, J.:

The respondents have recovered a judgment for royalties under an agreement permitting the appellant to make and sell tile for flooring and other purposes. The appellant claims that what it manufactured and sold was not covered by said agreement or by the patents on which said agreement rested.

The respondents became the owners by assignment or otherwise of two letters patent. The first of these was issued to cover an alleged new and useful design "for a tile." The specifications attached to said letters stated that the essential feature of the design consisted in "circular disks A (referred to in the design) embedded in the

Opinion of the Court

binding material B, and arranged one alongside the other, and with their peripheral surfaces in contact to form on the face of the tile triangular figures C, of the material B, between adjacent disks A."

The second letters patent covered an alleged new and useful improvement in "tiling for floors, walls, ceilings, fire places, etc." The specifications attached to said letters patent stated that the invention consisted "principally of tiling comprising small disks embedded in cement or other binding material and with the peripheral surfaces of the tiles in contact with each other and a filling or binding material in which the said disks are embedded and which fills the triangular spaces between the adjacent disks to bind the same at their edges and to form part of the design of the tile at the top surface thereof." It is important in this controversy to note that these specifications constantly refer to the completed article produced by the combination of all the elements as "tile" or "tiling" and to the principal element used in producing it as "disks" or "tile-disks," and, also a matter of some importance in subsequent discussion, the specifications point out that these disks may be "laid singly in the binding material" or "in sections assembled and pasted on paper."

After the issue of said letters an agreement was made between the respondents and the appellant which, after reciting that the former were the owners of said letters patent and the latter was desirous of making and selling "circular tile mentioned in and covered by each of said patents and has requested from said party of the first part (respondents) a license so to do," amongst other things granted to the appellant a license "to make and sell circular tile mentioned in and covered by each of said patents during the term thereof (hereof)," and obligated respondents to furnish assistance in making designs of "circular tile" and to inform appellant "as to the methods used by said firm (respondents) of putting and arranging

Opinion of the Court

circular tile on paper." And it obligated the appellant on its part, amongst other things, to pay as royalty a certain per cent of the price at which it might "sell or consign for sale any such circular tile referred to and covered by said patents and each of them, whether mounted on paper, in bulk or otherwise;" also to sell and invoice all such "circular tile" under the name of the "Alexander Patent" and stamp "each such circular tile" with the word "patent" or "patented."

For some time after the execution of this agreement appellant without objection paid satisfactory royalties on the product which it manufactured and sold under the assumed license of this agreement. But after a time it took the position that the simple earthenware disks used in manufacturing or producing the tiling referred to in the letters patent as already quoted when sold by themselves rather than as part of the entire design or product covered by said letters did not come within the purview of the agreement and, therefore, did not call for the payment of any royalties which it thereupon refused to pay, and the underlying issue between the parties on this appeal springs from this contention. The respondent claims that such circular disks do come within the terms of the agreement and the courts below sustained this view.

In seeking a determination of the controversy I shall consider, *first*, the meaning of the contract between the parties; *second*, the acts of the appellant in manufacturing and selling certain articles as bringing it or not within the requirements of the agreement to pay royalties, and, *lastly*, what questions the appellant is able to present to us in view of the manner in which its trial counsel allowed the case to be disposed of at the Trial Term.

While it is stated by counsel that the agreement between the parties was "no business man's agreement," but was prepared with great care, it constantly falls into a confusion of terms which has provoked some uncertainty

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and much discussion as to its meaning. As the quotations already made show, it grants a license by the respondents to the appellant to make and sell "circular tile mentioned in and covered by each" of the patents referred to. It then imposes upon the appellant the obligation to pay a royalty upon the sale of "any such circular tile referred to and covered by such patents and each of them, *whether mounted on paper, in bulk or otherwise.*"

The letters patent and specifications show that the design patented and owned by respondents did not at all consist of a "circular tiling," but that the tiling thus patented was composed in part of circular "disks." Therefore, when the granting clause of the agreement gave to appellant the right to make and sell "circular tile mentioned in and covered by" said letters patent, the phrase as a whole perhaps might be construed as defining the completed tiling composed of all the different elements covered by the patent. But the clause by which the appellant agrees to pay royalties on "circular tile, *whether mounted on paper, in bulk or otherwise,*" can only be construed as meaning and contemplating that the appellant should pay royalties on the manufacture and sale of circular "disks" whether they are mounted on paper for use, as outlined in the specifications, or were sold in bulk, that is, as disconnected, detached pieces. This clause would not with any aptness describe completed tiling.

Therefore I agree with the contention of the respondents that appellant in terms has agreed to pay royalties on the manufacture and sale of disks. But this provision and obligation is to be construed with reference to the other provisions of the contract and the situation of the parties. Respondents had patents on tiling, a composite production, and there was no patent on disks as an isolated article. They were only covered by the patents when used as an element in producing the completed design which was patented. The respondents were trying to give and the appellant to obtain a license to make

something which the former controlled by their patents, and, therefore, when the appellant agreed to pay royalties on disks I think there must be implied that this agreement applied only in case the disks were made and sold for the purpose of being used in producing the patented article and that it would not compel the payment of royalties on the sale of mere disks if made for some purpose entirely apart from and disconnected with respondents' patents. This construction gives an harmonious and intelligent meaning to the contract as a whole, and it applies, as creating a sufficient necessity for the license, the principle of the well-settled rule that when one without license makes and sells one element of a patented combination with the intention and for the purpose of bringing about its use in such a combination, he is guilty of contributory infringement and is equally liable with him who in fact organizes the completed combination. (*Thomson-Houston Electric Co. v. Ohio Brass Co.*, 80 Fed. Rep. 712; *Rumford Chemical Works v. N. Y. Baking Powder Co.*, 136 Fed. Rep. 873; *Loew Filter Co. v. German-American Filter Co.*, 107 Fed. Rep. 949; *Victor Talking Machine Co. v. Leeds & Catlin Co.*, 150 Fed. Rep. 147.)

In fact it is conceded by the appellant that if otherwise valid this contract would compel the payment of royalties on the manufacture and sale of completed tiling as specified in the letters patent and also on the manufacture and sale of disks intended to be used by others in the manufacture of such tiling.

Without referring to it in detail the evidence permits the conclusion, at least as a matter of fact, that for over seven years after the execution of the contract the appellant manufactured and sold circular disks for the purpose of being used by others as an element in producing tiling such as was covered by the respondents' letters patent and such as was within the terms of the agreement, and paid royalties thereon. It also permits the inference that after the expiration of that period, although appellant

served notice that it would no longer pay royalties, it continued to manufacture and sell circular disks for the same purpose as before. There was no question whatever about the manufacture and sale of these disks, and there really was no claim on the trial that the appellant after it refused to pay royalties was not manufacturing and selling them for the purpose of tiling covered by respondents' letters patent. There was no suggestion then and there is no definite one now that such disks were ever used for any other purpose or in any other way, or that in manufacturing and selling them appellant contemplated anything else than that they would be used for such purposes, and if this is so, as already indicated, the obligation to pay royalties followed so far as this feature is concerned.

At the close of the plaintiff's case a motion was made to dismiss the complaint on various grounds and denied. Appellant then called a witness and after qualifying him asked him the following question:

"Q. Did the American Encaustic Tiling Company between the 24th day of February, 1906, and the 15th day of August, 1907, make or sell, manufacture and sell or consign a tiling consisting of circular disks embedded in binding material, arranged one alongside the other, with their peripheral edges in contact so as to form triangular figures between the disks?"

This question having been objected to and excluded, plaintiffs' counsel asked for a direction of a verdict, and to such direction appellant's counsel not only made no objection, but expressly conceded that under the ruling of the court on said question and the judge's theory of the case there was nothing to go to the jury.

Therefore, even if the evidence did present a question of fact concerning the purpose of appellant in making and selling these circular disks, the right to have that question submitted to the jury was lost by appellant's counsel, and the only inquiry left is whether the appellant

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was injured by the ruling of the court in excluding an answer to the question which is quoted.. If I am right in my view of the law it was not so injured. It made no difference in appellant's obligation to pay royalties whether it manufactured and sold circular disks worked into the completed tiling or design covered by the letters patent or whether it manufactured and sold these disks to other persons for such purpose. The respondents made no claim for royalties on the sale of a completed design of tiling, such as is described in this question. Their only demand in the complaint and by their evidence was because of the sale of what was denominated "circular tile," and which, as I have already pointed out, must be construed as meaning circular disks. Therefore, it was utterly unresponsive to this claim to call for the evidence suggested by the question which was asked. Nor can the defendant successfully urge that it was prevented from asking questions which might have elicited material testimony because it was prohibited from asking an entirely immaterial question and the answer to which could in no way be a basis for the other questions now suggested. It is of course true that a party cannot produce all his evidence at once, but it has never been held that he may lay the foundation for material and competent questions by asking those which are immaterial or incompetent.

Therefore, I think that the final judgment is not infected with any error committed on the trial which required its reversal.

The appeal also brings up for review an affirmance of an interlocutory judgment sustaining a demurrer to certain purported defenses and counterclaims set forth in a former answer. The appeal from this judgment seems to have been abandoned so far as it sustained the demurrer to the counterclaims, and we think that no error was committed in sustaining the demurrer to the other portions of the answer.

The judgment should be affirmed, with costs.

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WILLARD BARTLETT, J. (dissenting). I think my brother HISCOCK is right in his construction of the contract, that is to say, that it obligated the defendant to pay royalties not only on the patented tiling but also on all earthenware disks designed to be used and sold to a customer for the purpose of being used in such patented tiling.

I am unable to concur with him, however, in the view that "the final judgment is not infected with any error committed on the trial which requires its reversal." I think that the question asked of the witness Richard Nicklin was a proper one, and that the objection to it should not have been sustained. The defendant was entitled to show, if it could, that it had not violated the contract either by making and selling the completed tiling covered by the patent or the separate disks for the purpose of being used in such tiling. The fact that the testimony sought to be elicited by this question related only to the first point and not the second did not make it inadmissible. A party is not obliged to prove his whole case or defense at one stage of his case or by the testimony of one witness. The exclusion of this evidence was obviously based upon the proposition that the defendant was estopped from introducing any proof to sustain its defense, and this view seems to me clearly erroneous.

This appeal also brings up for review the affirmance of a judgment sustaining the plaintiff's demurrer to certain defenses set up in the answer. I think that the second of these defenses was sufficient in law, and that it was error to deprive the appellants of the benefit thereof.

For these reasons I feel obliged to dissent.

GRAY, WERNER, CHASE and COLLIN, JJ., concur with HISCOCK, J.; WILLARD BARTLETT, J., reads dissenting opinion; CULLEN, Ch. J., absent.

Judgment affirmed.

Complaint: Patents; Action for Royalties on Sale of Essential Parts of Patented Combination ¹

**Elmer E. Alexander, Charles C.
Alexander and Willard C. Reid,
copartners doing business under
the firm name and style of
Davis, Reid & Alexander,
Plaintiffs,
against
American Encaustic Tiling Co.,
Limited,
Defendant.**

3. That heretofore and on or about the 7th day of July, 1898, the said defendant entered into an agreement in writing and under seal with the plaintiffs herein, a copy

¹ From *Alexander v. American Encaustic Tiling Co.*, 207 N. Y. 276; aff'g 144 App. Div. 931; 129 Supp. 1111 (no opinion). See *ante*, page 304.

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of which agreement is hereto annexed, marked Exhibit "A," and made a part hereof.

4. That in and by said agreement the said plaintiffs being the owners of two certain United States patents, No. 25,109, issued on or about January 28th, 1896, and No. 602,691, issued on or about April 19th, 1898, respectively, copies of which were annexed to said agreement, duly granted unto the said defendant a license to make and sell circular tile mentioned in and covered by each of the said patents during the term of said agreement, or mentioned in and covered by any improvements upon said patents that might be obtained by the plaintiffs during said term, subject to the provisions of said agreement, and in consideration thereof the said defendant promised and agreed to pay to the said plaintiffs a royalty of 5% of the price at which said defendant should sell or consign for sale any such circular tile referred to and covered by said patents and each of them, or any improvements thereon, whether mounted on paper, in bulk or otherwise, such royalty to be paid monthly, during the term of said agreement, on the 15th day of each and every month, and each such payment to include all shipments, sales, and consignments of said tile made by the said defendant during the then preceding month, and in consideration of such royalty being paid in cash at each of the times therein mentioned, a discount upon the same of 5% (i. e., one-twentieth of said 5% royalty) should be allowed to said company, but no discount upon said royalty should be allowed for any cash discount upon sale prices which said defendant might allow to its own customers or consignees, and the said defendant further agreed to assume all liability for the payment of the amount and value of all sales and consignments of such tile to be made by it so far as the same might affect the said royalty of the said plaintiffs in connection therewith; to keep a separate "sales books" of and for all sales and consignments of such circular tile as are covered by or referred to in said

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patents, or either of them, and which should contain also the actual selling and consignment price of such tile, which said book should be open at all times to the inspection of the plaintiffs or their duly authorized agent; to submit, at the request of said plaintiffs, on the 15th day of each and every month during the term of said agreement, a sworn statement showing the aggregate amount of all sales and consignments of such tile, both in quantity and value of the month previous thereto, and at all times offer for sale, illustrate, advertise, sell, consign and invoice all such circular tile as covered by and under the name of the "Alexander Patent," to stamp or cause to be stamped upon the back of each such circular tile manufactured, sold or consigned by said company the word "patent" or "patented." The said defendant further agreed, in and by the terms of the said agreement, to recognize at all times the validity of each of said patents and carefully to guard and protect the interests and rights of the said plaintiffs thereunder, and to take no action whatever either directly or indirectly that might in any way impair or be detrimental to the interests and rights of the said plaintiffs under said patents or either of them; that the said agreement should continue for a period of ten years from the date thereof, and that it should be binding upon the parties thereto, their legal representatives, successors and assigns.

5. That on the first day of March, 1904, the said firm of Davis, Reid & Alexander, by an instrument in writing, for a valuable consideration, assigned, transferred and set over unto the Alexander & Reid Co., a domestic corporation, all its rights, title, and interest in and to the said contract, for the purpose of the collection of the royalties thereon, and that from the said 1st day of March, 1904, to the 4th day of September, 1907, the said Alexander & Reid Company was entitled to receive from the said defendant any and all payments of royalties which became due from the said defendant under the provisions of said contract.

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That on the 4th day of September, 1907, the said Alexander & Reid Co., by an instrument in writing for a valuable consideration duly assigned, transferred and set over to the plaintiffs herein all its right, title, and interest in and to the said contract, any and all sums of money due and to become due thereunder, and in and to any and all cause or causes of action which had accrued to it by reason of the breach by the said defendant of the terms of the said contract or otherwise and that the said plaintiffs ever since have been, and still are the sole and absolute owners of said contract and of all the rights thereunder and to any and all cause or causes of action for the breach thereof by the said defendant.

6. That between the 7th day of July, 1898, and the date of the commencement of this action the said defendant, in pursuance of said agreement, manufactured, sold or consigned large quantities of circular tile, such as is covered by the said patents or by one of them and by said agreement, and that it has received large sums of money therefor. That between the 7th day of July, 1898, and the 23d day of February, 1906, the said defendant paid various sums of money to these plaintiffs, or to their assigns, as royalties under the said contract, and that for such tile manufactured, sold or consigned since the 23d day of February, 1906, the said defendant has refused and still refuses to pay to the said plaintiffs or their assigns any royalties under said contract although, on information and belief, since February 23d, 1906, it has continued to manufacture and sell or consign large quantities of the said circular tile and to receive large sums of money therefor, to wit, for such tile manufactured, sold or consigned, from February 24th to 28th, 1906, \$408.17; during the month of March, 1906, \$4,330.01; during the month of April, 1906, \$6,400.31; during the month of May, 1906, \$4,820.49; during the month of June, 1906, \$8,681.85; during the month of July, 1906, \$5,879.59; during the month of August, 1906, \$7,792.11; during the month of

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September, 1906, \$2,911.56; during the month of October, 1906, \$6,735.94; during the month of November, 1906, \$3,021.71; during the month of December, 1906, \$4,329.40; during the month of January, 1907, \$5,514.84; during the month of February, 1907, \$4,425.17; during the month of March, 1907, \$5,973.39; during the month of April, 1907, \$5,467.56; during the month of May, 1907, \$5,541.23; during the month of June, 1907, \$6,946.57; during the month of July, 1907, \$4,470.51.

7. On information and belief, that, under the terms of the said contract, the following sums became due and payable to said plaintiffs or their assigns as royalty upon such tile manufactured, sold or consigned by said defendant during said period from February 24th, 1906, to July 31st, 1907, inclusive, to wit, on March 15th, 1906, \$20.41; on April 15th, 1906, \$216.50 on May 15th, 1906, \$320.02; on June 15th, 1906, \$241.02; on July 15th, 1906, \$434.09; on August 15th, 1906, \$293.98; on September 15th, 1906, \$389.61; on October 15th, 1906, \$145.58; on November 15th, 1906, \$336.80; on December 15th, 1906, \$151.09; on January 15th, 1907, \$216.47; on February 15th, 1907, \$275.74; on March 15th, 1907, \$221.26; on April 15th, 1907, \$298.67; on May 15th, 1907, \$273.38; on June 15th, 1907, \$277.06; on July 15th, 1907, \$347.33; on August 15th, 1907, \$223.52, no part of which has been paid, although duly demanded.

Wherefore, plaintiffs demand judgment against the defendant for the sum of \$4,682.50 with interest as follows: On \$20.41 from March 15th, 1906; on \$216.50 from April 15th, 1906; on \$320.02 from May 15th, 1906; on \$241.02 from June 15th, 1906; on \$434.09 from July 15th, 1906; on \$293.98 from August 15th, 1906; on \$389.61 from September 15th, 1906; on \$145.58 from October 15th, 1906; on \$336.80 from November 15th, 1906; on \$151.09 from December 15th, 1906; on \$216.47 from January 15th, 1907; on \$275.74 from February 15th, 1907; on \$221.26 from March 15th, 1907; on \$298.67 from April 15th, 1907; on

Complaint—Exhibit "A"

\$273.38 from May 15th, 1907; on \$277.06 from June 15th, 1907; on \$347.33 from July 15th, 1907, and on \$223.52 from August 15th, 1907, together with the costs and disbursements of this action.

EVERETT J. ESSELSTYN,
Attorney for Plaintiffs,
2 Rector Street,
Borough of Manhattan,
City of New York.

[Verification]

(There was also attached to the complaint a copy of the patent.)

EXHIBIT "A"

ARTICLES OF AGREEMENT made this seventh day of July, 1898, between the firm of Davis, Reid & Alexander, doing business at No. 18 East 15th Street, in the Borough of Manhattan, in the City of New York (hereinafter designated as "said firm"), party of the first part, and the AMERICAN ENCAUSTIC TILING COMPANY, LIMITED, a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at Zanesville, in the State of Ohio (hereinafter designated as "said company"), party of the second part.

Whereas the said party of the first part is the owner of two certain United States patents, one numbered 25109 issued on or about January 28, 1896, and the other numbered 602691, issued on or about April 19, 1898, a copy of each of which is hereto annexed and made part hereof, and

Whereas the said party of the second part is desirous of making and selling circular tile mentioned in and covered by each of said patents, and has requested from said party of the first part, a license so to do.

WITNESSETH

That the said parties hereto, in consideration of the premises and of the sum of One Dollar each to the other in

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hand paid, the receipt whereof is hereby acknowledged, and of the mutual covenants and conditions herein contained, hereby covenant and agree as follows:

FIRST: The said party of the first part:

(a) Hereby grants unto the said party of the second part a license to make and sell circular tile mentioned in and covered by each of said patents during the term hereof, or mentioned in and covered by any improvements that may be obtained by said party of the first part upon said patents or either of them during the term hereof, subject to the provisions of this agreement.

(b) Hereby agrees to furnish, within said Borough, without expense to said Company, assistance to said Company, in the making of designs of circular tile for the purpose of catalogue printing if said company so desires, and to inform said Company therein as to the methods used by said firm of putting and arranging circular tile on paper.

SECOND: And the said party of the second part hereby covenants and agrees,

1. To pay to the said party of the first part a royalty of five per cent. (5%) of the price at which said Company shall or may hereafter sell or consign for sale any such circular tile referred to and covered by said patents and each of them, whether mounted on paper, in bulk or otherwise, such royalty to be paid monthly during the term hereof on the 15th day of each and every month and each such monthly payment to include all shipments, sales and consignments of said tile, made by said Company during the then preceding month; in consideration of such royalty being paid in cash at each of the times hereinbefore mentioned, a discount upon the same of five per cent. (5%) i. e., one-twentieth (1/20th%) of the said five per cent. (5%) royalty is to be allowed the said Company, but no discount upon said royalty shall be allowed for any cash discount upon sale prices which said Company may allow to its own customers or consignees in the event that the said

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party of the second part shall fail to make payment of any of such royalties within ten (10) days after the same may become due and payable by the terms of this agreement, it is hereby mutually understood and agreed that the said party of the first part may, at its option, forthwith terminate this agreement by giving to the said party of the second part written notice of its election so to do, and that all rights of the said party of the second part hereunder shall thereupon cease and be determined. And the said party of the first part hereby agrees to grant to no manufacturer a license of the same extent as that herein contained at less royalty than five per cent. (5%) upon all sales and consignments except as herein contained.

2. To assume all liability for the payments of the amount and value of all sales and consignments of such tile to be made by said Company in so far as the same may affect the said royalty of the said party of the first part in connection therewith; to keep a separate "sales book" of and for all sales and consignments of such circular tile as are covered by or referred to in said patents or either of them, and which shall contain also the actual selling and consignment price of all such tile and shall be open at all times to the inspection of said firm or its duly authorized agent; to submit at the request of the said party of the first part a sworn statement on the 15th day of each month during the term hereof, showing the aggregate amount of all sales and consignments of such circular tile both in quantity and value for the month previous thereto.

3. To at all times offer for sale, illustrate, advertise, sell, consign and invoice all such circular tile as covered by and under the name of the "Alexander Patent" and to stamp or cause to be stamped upon the back of each such circular tile manufactured, sold or consigned by said company, the word "patent" or "patented."

THIRD: The said party of the first part, hereby further agrees to use reasonable measures for the protection of each of said patents and to promptly inform the said

party of the second part of the nature of any litigation that may be instituted to determine the rights of the said party of the first part under either of said patents, but it is mutually agreed and understood between the parties hereto that said firm shall in no way and in no event be held responsible to said Company for any loss or damage which said Company may sustain in case of an infringement of said patents or either of them by any party or parties, or in the event that said patents or either of them shall hereafter be declared invalid.

FOURTH: If said patents or either of them be declared invalid by any final decree or final judgment of any court of competent jurisdiction of last resort, it is hereby agreed that this agreement shall terminate at the date of the entry of such final decree or judgment; the said party of the second part hereby covenants and agrees to recognize at all times the validity of each of said patents and to carefully guard and protect the interest and rights of the said party of the first part thereunder, and to take no action whatsoever either directly or indirectly, that may in any way impair or be detrimental to the interests and rights of the said party of the first part under said patents or either of them.

FIFTH: It is hereby mutually agreed and understood that nothing herein contained shall prevent or restrain in any way the said party of the first part from setting, selling, manufacturing or dealing in any and all kinds of circular tile in any part of the United States or Canada or from continuing the importation of said circular tile or from purchasing circular tile from any other manufacturer or parties whomsoever; that this agreement shall not be considered an exclusive license and that said firm expressly reserves to itself the right to license, at its option, any manufacturer or manufacturers other than the said party of the second part to make and sell circular tile under said patents or either of them.

SIXTH: It is hereby further mutually agreed and under-

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stood that this agreement shall continue for a period of ten (10) years from the date hereof, subject however to the provisions and conditions herein contained.

SEVENTH: It is hereby further mutually agreed and understood that this agreement is binding upon the parties hereto, their legal representatives, successors and assigns.

IN WITNESS WHEREOF, the said party of the first part has hereunto set its hand and seal and the said party of the second part has caused these presents to be signed by its President and its corporate seal to be hereto affixed and attested by its Secretary, the day and year first above written.

AMERICAN ENCAUSTIC TILING Co.,
Limited.

By B. Fisher,
President.

Attest:

Charles A. Flammer, Secretary.

Sealed and delivered in
the presence of:

E. J. Esselstyn as to
Willard C. Reid (seal)
Elmer E. Alexander (seal)
Charles C. Alexander (seal)

[Acknowledgment.]

LILLIAN ROBERTS, an infant, by ANTON ENZ, her guardian *ad litem*; Plaintiff, v. WARREN SILAS ROBERTS, Defendant

(Supreme Court, N. Y. Special Term, Part I, September 18, 1913)

Alimony; contempt; imprisonment under final decree when defendant has already served a term of six months' imprisonment for failure to pay alimony awarded pendente lite

1. Notwithstanding a defendant in a matrimonial action has served a term of six months' imprisonment for contempt of court in failing to comply with an order to pay alimony *pendente lite*, he may be further imprisoned for contempt for failure to pay alimony awarded by a final decree in the action.

Motion to punish defendant for contempt for failure to comply with a final decree awarding alimony to the plaintiff.

Granted.

Alphonse G. Koelble, attorney for the plaintiff.

No appearance for the defendant.

DELANY, J.:

The defendant for failure to pay alimony *pendente lite* on the interlocutory order was adjudged in contempt and imprisoned. Having failed to comply with the final judgment requiring the payment by him of permanent alimony, he asserts his previous imprisonment for a term of six months as giving him immunity from further punishment. In this he is in grave error. He is subject to the operation of §§ 111 and 1773 of the Code. *Reese v. Reese*, 46 App. Div. 156; 61 Supp. 760; and *People ex rel. Levine v. Shea*, 201 N. Y. 471, at page 476. The opinion of Judge VANN in the latter case instead of unsettling the law as set forth in 46 App. Div. 156; 61 Supp. 760, is in fact confirmatory of it. Motion granted, with \$10 costs.

THE SPEEDWELL MOTOR CAR COMPANY, Plaintiff, v.
JOSEPH A. BOYCE, Defendant

(Supreme Court, N. Y. Special Term, Part I, October 3, 1913)

**Bill of particulars; function of; motion for based on attorney's
affidavit**

1. As the function of a bill of particulars is not to give information as to facts in the possession of the party required to furnish it, but to particularize the "claim" of such party there is little reason for insisting that the application therefor shall be based on the affidavit of the party rather than that of the attorney.

Motion for bill of particulars.

Granted.

Stover & Hall, attorneys for the plaintiff.

Wingate & Cullen, attorneys for the defendant.

BLUR, J.:

Motion for a bill of particulars. It is now clearly recognized that the function of a bill of particulars is not to give information as to facts in the possession of the party required to furnish the bill, but, as expressed in the Code, to particularize the "claim" of such party. See *Dwyer v. Slattery*, 118 App. Div. 345; 103 Supp. 433. There would seem, therefore, to be little reason for insisting that the affidavit upon which the application for the bill is based be verified by the party rather than by his attorney. I think that, under the circumstances of this case, the affidavit of the attorney is sufficient. See *Kirkland v. Kirkland*, 80 Supp. 21. Motion granted.

MORRIS J. SOLOMON, Plaintiff, v. THE BANK OF NEW YORK,
Defendant

(Supreme Court, N. Y. Special Term, Part I, October 22, 1913)

Dismissal of complaint after plaintiff's motion for judgment overruling a demurrer to the complaint has been denied; practice

1. After a motion by the plaintiff for judgment overruling a demurrer to the complaint has been denied, a motion by the defendant for a final judgment dismissing the complaint cannot be granted, as the remedy of the defendant in such a case is to bring on the demurrer for argument as an issue of law in which he can have a judgment of dismissal.

Motion by the defendant for final judgment dismissing the complaint.

Denied.

John Reilly, attorney for the plaintiff.

Satterlee, Canfield & Stone, attorneys for the defendant.

NEWBURGER, J.:

This is a motion made by the defendant for a final judgment dismissing the complaint herein. The defendant interposed a demurrer to the complaint, thereupon the plaintiff moved for judgment on the pleadings, overruling the defendant's demurrer. This motion was denied and the order that was entered simply denied the motion, with costs, which left the demurrer as a pleading, and the defendant is left to his remedy to bring the case on as an issue of law in which he can have a judgment of dismissal. At this time I cannot find any authority that will warrant my granting the relief prayed for, therefore this motion must be denied.

LEHIGH VALLEY RAILROAD COMPANY, Respondent, v.
AUBURN CONSTRUCTION COMPANY, Appellant ¹

(207 N. Y. 721; aff'g without opinion 142 App. Div. 928; 126 Supp. 1136, no opinion)

Railroads; action for freight charges and demurrage ¹

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered January 31, 1911, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

E. C. Aiken for appellant.

J. M. Brainard for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, WERNER, CHASE, COLLIN, CUDDEBACK and MILLER, JJ.

¹ For complaint from this case see *post*, page 327. For decision of trial judge on motion to set aside verdict and for a new trial see note below.

² The opinion of the trial judge on the motion for a new trial is not elsewhere reported and is published in full below:

FOOTE, J.:

At the conclusion of the trial, the court, on motion of plaintiff's counsel, directed a verdict in favor of plaintiff for \$3,334.47. Defendant's counsel then moved, upon the minutes of the court, to set aside this verdict and for a new trial, which motion was entertained and has recently been submitted upon briefs of counsel.

The defendant in the years 1907 and 1908 was engaged in the construction of a railroad, known as the New York, Auburn & Lansing Railroad, which, at or near Auburn, had a physical connection with the tracks of the plaintiff's railroad. A large quantity of material and supplies, such as rails and ties for use in the construction of this railroad, defendant caused to be shipped consigned to itself at Auburn,

Complaint

Form No. 30

Complaint; Railroads; Action for Freight Charges and Demurrage¹

Supreme Court, Cayuga County.

Lehigh Valley Railroad Company, Plaintiff, against Auburn Construction Company, Defendant.	}
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The plaintiff above named complains of the defendant and upon information and belief alleges the following facts constituting its cause of action:

N. Y., in carload lots from points outside the State of New York. The business was, therefore, interstate commerce. During this period, the railroad which defendant constructed was, to some extent, in operation and freight was received from that road by plaintiff for transportation and the charges thereon accruing to defendant for defendant's share of the through rate were sometimes received and retained by plaintiff and the amount thereof became an indebtedness from plaintiff to defendant, and prior to December 17, 1907, plaintiff had been in the habit of granting credit to defendant in respect to freight charges accruing to plaintiff on shipments over plaintiff's line consigned to defendant, but on that date plaintiff refused to grant any further credit to defendant and refused to deliver freight except upon payment of freight charges due thereon. After December 17, 1907, a large number of cars loaded with freight consigned to defendant arrived over plaintiff's lines at Auburn on which the freight charges had not been paid, and plaintiff held these cars in its yards and on sidings at Auburn awaiting payment of freight charges by defendant and refusing to deliver the cars or their contents to defendant until these charges were paid. Demurrage of car service charges accrued upon these cars while being held by plaintiff awaiting delivery, and no question was made at the trial or is made here but that the amount of freight charges included in the

¹ From *Lehigh Valley R. R. Co. v. Auburn Construction Co.*, 207 N. Y. 721 aff'd without opinion 142 App. Div. 928; 126 Supp. 1136, no opinion. See *ante*, page 326.

Complaint

That the plaintiff is and was at all the times hereinafter mentioned a foreign railroad corporation organized and existing pursuant to the laws of the State of Pennsylvania,

verdict is the correct amount due to plaintiff therefor, nor does defendant question upon this motion its liability for that part of the verdict which represents freight charges. But a considerable part of this verdict is for demurrage or car service charges, and as to this defendant contends that it is not liable, or the question of the liability should have been submitted to the jury, and that a new trial should be ordered unless plaintiff stipulates to reduce the amount of the verdict by the amount of the demurrage or car service charges. Defendant does not question the fact that plaintiff is obliged to charge the uniform rate of demurrage which is placed in its published tariffs in accordance with the Interstate Commerce Law and the regulations of the Interstate Commerce Commission, but defendant's counsel now contends that defendant is not liable for car service charges, because, as he claims, the evidence shows defendant was willing to unload these cars upon plaintiff's premises, leaving their contents in plaintiff's possession and thus releasing the cars.

The counsel who now represents defendant was not its counsel at the trial. He derives his information from a study of the stenographer's minutes, and puts a different interpretation on certain testimony of the witness Clarke than was claimed for it at the trial. Mr. Clarke, who was the chief engineer for defendant and who represented defendant in regard to shipments consigned to it, was called as a witness for defendant. He testified to conversations with the local freight agents at Auburn after the time plaintiff discontinued giving credit to defendant for freight charges, in which conversations Clarke endeavored to make some arrangement for a delivery of the cars which were being held for charges. He testified that these agents told him they were not authorized to allow the cars to be delivered until the charges were paid. He then said that at some time not named or fixed he met Mr. Titus on the train and Mr. Titus asked him "if he couldn't get that material off the cars." Clarke says, "I told him we were perfectly willing to take it off the cars, but it wouldn't be delivered unless the charges were paid, and asked him if it couldn't be delivered that we would be glad to unload it. I told him charges were accruing daily coming to our road and those charges would soon absorb the freight charges we owed them and they should permit us to unload it. Mr. Titus said the charges were not in his department and he couldn't permit it." On this testimony alone defendant's present counsel now claims that defendant offered to unload these cars, leaving their con-

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doing business as a common carrier of freight in the States of Pennsylvania, New Jersey and New York, and having its principal office in the City of Philadelphia, Pa.

tents in possession of plaintiff and thus release the cars. Who Mr. Titus was does not appear. It may be inferred that he was some officer of the plaintiff company, but he stated to Mr. Clarke that the matter was not in his department, and hence he could not comply with Mr. Clarke's request whatever it was.

The counsel who represented defendant at the trial did not claim or suggest that this, or any other testimony in the case, showed an offer or a willingness on the part of the defendant to unload these cars upon plaintiff's premises for the purpose of releasing the cars or for any other purpose. It wasn't suggested that there was any such question in the case, nor was any request made to submit the case to the jury upon the theory that there was evidence of that character. Nor does the evidence bear the interpretation now put upon it by the present counsel for the defendant, when considered in connection with the other testimony in the case. Mr. Clarke made repeated efforts to secure the delivery of these cars upon the tracks of defendant's railroad without prepaying the freight charges. He applied to plaintiff's local agents at Auburn and to the general offices of plaintiff's company in New York and Philadelphia, and on none of these occasions does he claim to have suggested a wish or willingness to unload the contents of these cars upon plaintiff's premises. And later, when plaintiff's claim was put into the hands of Mr. Janiver, its assistant general solicitor, and suit was threatened, Mr. Clarke writes Mr. Janiver under date of April 4, 1908 (Exhibit 8), objecting to that part of the car service charges which accrued while plaintiff was retaining funds due to defendant company for outgoing freights, and asking that some allowance be made on this account; and again on April 23, 1908 (Exhibit 9) Mr. Clarke writes Janiver, submitting a proposition of settlement and saying: "That for the present we disregard any claim which we have for rebate of car service charges accrued upon cars which were held for freight charges at a time when there was a balance due the Auburn Construction Company by the Lehigh Valley road," and suggesting no other ground whatever for a claim of rebate in respect to these car service charges.

In view of the fact that it was not shown that Mr. Clarke or any other representative of defendant ever suggested the unloading of these cars upon plaintiff's property to any other agent or representative of the company; that it was not claimed or suggested during any of the negotiations for settlement prior to the bringing of this suit

Complaint

That the defendant is and was at all the times herein-after mentioned a domestic corporation having its principal office in the City of Auburn, County of Cayuga and State of New York.

that defendant had any claim for rebate of car service charges on this ground; that no claim was made at the trial that defendant had ever made such an offer or that the testimony of Mr. Clarke was to any such effect, I think that Mr. Clarke's testimony above quoted cannot be given the interpretation claimed for it by the present counsel for defendant. He says that Mr. Titus asked him somewhere on a railway train, "If we couldn't get the material off the cars." Was that a request by Mr. Titus that defendant should unload the material and leave it on plaintiff's premises? If so, it conveyed not only a consent but a request to Mr. Clarke to do so, but I apprehend that it was a request that Mr. Clarke's company should get the material off the cars by accepting a delivery of the cars and paying the charges. Mr. Clarke's reply was, "I told him we were perfectly willing to take it off the cars, but it wouldn't be delivered unless the charges were paid and asked him if it couldn't be delivered that we would be glad to unload it." That is to say, while Clarke was perfectly willing to take it off the cars, he couldn't do so because the material would not be delivered unless the charges were paid, and he asked if it couldn't be delivered, as they would be glad to unload it,—not to unload it upon plaintiff's premises but to unload it after it was delivered, which meant unloaded somewhere along the line of defendant's railroad where it was to be used. Then Clarke continues, "I told him charges were accruing daily coming to our road and those charges would soon absorb the freight charges we owed them and they should permit us to unload it." This shows clearly that what Clarke was requesting was a delivery of those cars without prepayment of the charges, for the reason that countercharges were accruing in favor of defendant which would in time take care of the charges due to plaintiff. So it was a release of the cars which were being held for charges which Mr. Clarke was asking for and not the privilege of unloading the cars, leaving their contents in plaintiff's possession pending the payment of charges. Mr. Titus' reply was that "the charges were not in his department and he couldn't permit it," showing that Mr. Titus understood that the request had reference to a delivery without payment of charges. Mr. Titus does not say that the unloading of the cars upon plaintiff's premises was not a matter in his department.

This testimony of Mr. Clarke would undoubtedly have been made clearer, had any suggestion been made at the trial that it had the mean-

Complaint

That during the years 1907 and 1908, and prior to April 4, 1908, the defendant caused to be delivered to this plaintiff divers consignments of freight and merchandise for transportation over its line of railroad to the City of Auburn aforesaid, and plaintiff did so transport the same as such common carrier as aforesaid to the said City of Auburn; that said freights and merchandise were all shipped and transported to and reached the City of Auburn in car load lots; that the freight charges upon said several consignments amounted in the aggregate to the sum of twenty-five hundred nineteen and 78-100 dollars (\$2,519.78); that the defendant did not promptly unload such freights and merchandise from the cars or

ing now attributed to it, and certainly if it had then been considered by either party as showing an offer on the part of defendant to release these cars from further detention by unloading their contents and leaving it in plaintiff's possession, we should have had further testimony as to whether it would have been a matter of economy to defendant to have incurred the expense of unloading and reloading these forty or fifty cars and as to whether there was storage room upon plaintiff's premises available for the purpose. I am satisfied that the testimony of Mr. Clarke should not be given the interpretation now claimed for it, and that it was not intended to have that meaning. Hence, I shall not examine the question, which is not considered in the briefs of counsel, as to whether if a request had been made by defendant to be permitted to unload these cars upon plaintiff's premises to stop the running of car service charges, it would have been the duty of plaintiff to permit it.

There is a further reason why this verdict should not be disturbed. It appears very clearly from the correspondence in evidence that the defendant at about the time this suit was begun procured a delay of several months in the prosecution of the case by virtue of an agreement then entered into with plaintiff to pay the whole amount of plaintiff's claim, including these demurrage charges, if plaintiff would forbear to press the suit. Plaintiff did forbear and by virtue of that agreement defendant obtained the delay asked for, which was a valid and sufficient consideration to support its agreement to pay plaintiff's claim in full.

It follows that this motion must be denied, with costs.

Dated, Rochester, N. Y., April 9, 1910.

Complaint

pay the freight charges thereon, but on the contrary allowed such freights and merchandise to remain upon such cars until car service charges amounting to two thousand one hundred fifty-four dollars (\$2,154) had accrued thereon; such freight charges and car service charges amounting in the aggregate to forty-six hundred seventy-three and 78-100 dollars (\$4,673.78), all of which the defendant promised and agreed to pay.

That on or about April 4, 1908, certain allowances were made to defendant by way of offset and corrections amounting to fourteen hundred eighty-eight and 5-100 dollars, and the amount due and unpaid on that day to plaintiff from defendant on account of such freights and car service charges fixed by agreement of parties at thirty-one hundred eighty-five and 73-100 dollars (\$3,185.73), no part of which has since been paid, and which defendant agreed to pay.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of thirty-one hundred eighty-five and 73-100 dollars with interest from April 4, 1908, besides the costs of this action.

TABER & BRAINARD,
Attorneys for Plaintiff,
122 Genesee Street,
Auburn, N. Y.

[Verification.]

NATIONAL SURETY COMPANY, Plaintiff, v. FILADELFO
ROSA, Defendant

(Supreme Court, N. Y. Special Term, Part I, September 28, 1913)

Pleading; complaint; demurrer; motion for judgment on the pleadings; injunction; surety for private banker having paid penal sum of bond into court, in former proceeding, seeking to restrain action by creditor of principal who did not receive notice of prior proceeding; application of the doctrine of *lis pendens* to former proceeding

1. Where a surety company, which had given a bond pursuant to L. 1908, c. 479, conditioned for the repayment of deposits by a private banker, had paid the entire penal sum of the bond into court, in a proceeding under Code Civ. Pro., § 743, in which the company was discharged from further liability on its bond, and the money was distributed, under the direction of a referee appointed by the court after such notice to creditors as the court directed, it was held that the entire liability of the surety company was discharged and it was entitled to an injunction against a creditor of the principal who did not have actual notice of the prior proceeding and who had made claim upon the bond based upon the banker's default. Where a demurrer was interposed to a complaint setting up such facts it was held that the plaintiff was entitled to judgment on the pleadings.
2. The doctrine of *lis pendens* applied to the former proceeding and any creditor or claimant who disregarded such constructive notice did so at his peril.
3. A creditor of a principal can no more enlarge the liability of a surety by neglecting to sue until after the lawful distribution of the entire penalty of the bond than a judgment creditor could enlarge his claim by recovering several judgments thereon against sureties of joint defendants.

Motion by the plaintiff for judgment on the pleadings after demurrer by the defendant.

Granted.

William J. Griffin, attorney for the plaintiff.

Michael Schneiderman, attorney for the defendant.

GUY, J.:

Plaintiff moves for judgment upon a demurrer to the complaint. The action is brought by a surety company, which gave a bond in the penal sum of \$15,000, pursuant to chapter 479, Laws of 1908, conditioned for the repayment of a private banker's deposits and the faithful holding and transmission of money by him, to restrain the prosecution of claims thereon because of the banker's default, the plaintiff having satisfied the bond by paying the entire amount thereof into court, and the court having thereupon enjoined all parties who then made or who might thereafter make claims against the plaintiff on said bond from prosecuting any of such present or future claims, except before the referee who was appointed to determine all such claims. The fund so deposited in court was all distributed, pursuant to the referee's decision, among the various claimants under said bond, made after such notice as the court prescribed. It does not appear that the demurring defendants were served with personal notice or otherwise than by such constructive notice as the court ordered. By § 743 of the Code the court is given plenary power to discharge a party paying money into court upon such notice as it may deem just. All the claimants under a bond in a penal sum for the faithful performance of a duty or trust can recover no more than the penal sum (Code, § 1915). The measure of the surety company's total liability under the bond in question is limited to the penalty of the bond. Equity has full power upon payment of the penal sum, less valid prior recoveries, into court, to distribute it in a single action or proceeding pro rata, so as to bind all creditors and claimants. *Guffanti v. Nat. Surety Co.*, 196 N. Y. 453, 456-8; *Illinois Surety Co. v. Mattone*, 138 App. Div. 173, 175-7; 122 Supp.

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928. The doctrine of *lis pendens* applies to such a proceeding, and any creditor or claimant who disregarded such constructive notice as the court in its discretion ordered did so at his peril. A creditor could no more enlarge the liability of the surety by neglecting to sue until after the lawful distribution of the entire penalty of the bond than a judgment creditor could enlarge his claim by recovering several judgments thereon against sureties or joint defendants. No matter how many claims or judgments there may be on or for the same obligation, equity will enjoin more than one satisfaction and that will operate as to all. *Lord v. Tiffany*, 98 N. Y. 412, 421. Demurrer overruled and judgment for plaintiff, with costs.

THE MANHATTAN STORAGE AND WAREHOUSE COMPANY,
Plaintiff, v. BENGUIAT ART MUSEUM, VITALL BENGUIAT,
LEOPOLD BENGUIAT and JULIUS HARBURGER, Sheriff of
the County of New York, Defendants

(Supreme Court, N. Y. Special Term, Part 3, September 15, 1913)

Interpleader; action of; warehouseman; claim by attachment creditor against bailor of goods; levy of attachment on goods in possession of bailee with warehouseman's lien, when goods alleged to have been fraudulently transferred by bailor

1. An action of interpleader by a warehouseman may be sustained by showing that an attachment has been levied against the goods by a creditor of the original bailor, on allegations that the transfer to the present claimant to ownership, to whom a bill of sale has been made by the original bailor, was fraudulent, even though the sheriff has not taken actual possession of the chattels and the warehouseman retains possession to protect its lien for storage charges.
 2. An attachment may be levied against tangible personal property, even though it has been transferred by a bill of sale antedating the warrant of attachment, where it is alleged that the transfer was in fraud of the plaintiff.
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3. A lien can be acquired under Code Civ. Pro., § 649, subdivision 3, upon tangible personal property belonging to the defendant in the attachment action, where such property is in the possession of a third party, but is subject to a lien so that actual possession cannot be taken by the sheriff.

Action of interpleader.

Judgment for the plaintiff.

Lehmaier & Bellet, attorneys for the plaintiff.

Ascher, Ogust & Goldstein, attorneys for the defendant Benguiat Art Museum.

Gould & Wilkie, attorneys for the defendants Vitall and Leopold Benguiat.

GREENBAUM, J.:

The practically undisputed facts as they existed at the time of the trial would scarcely justify a judgment of interpleader in favor of plaintiff were it not for the question that arises by reason of the service upon the plaintiff, a warehouseman, of the warrant of attachment and of the sheriff's notice thereunder that he thereby attached the property of H. Ephraim Benguiat and Mordecai Benguiat, the defendants in the action in which the attachment was granted. It is contended in behalf of the defendant the Benguiat Art Museum, the transferee of a valuable lot of goods originally stored with the plaintiff by said H. Ephraim and Mordecai Benguiat, that these goods having been transferred to it under a bill of sale which antedates the issuance of the warrant of attachment are not attachable, even though it be claimed that the transfer was fraudulent as against creditors, the plaintiffs in the attachment action. The law, however, is well settled to the contrary. *Hess v. Hess*, 117 N. Y. 306; *Skilton v. Codington*. 185 N. Y. 80, 87. It is further in-

sisted that in no event can a levy be made upon tangible property unless the goods are taken by the sheriff in his actual custody. This unquestionably is ordinarily the rule. The Appellate Division, however, has held that such is not the requisite when the goods to be levied upon are subject to a lien in favor of the party in whose possession they are found. Thus in *Gavazzi v. Dryfoos*, 110 App. Div. 90; 97 Supp. 59, in apparent reliance upon *Warner v. Fourth Nat. Bank*, 115 N. Y. 251, it is stated that "a lien can be acquired under subdivision 3 of § 649 of the Code of Civil Procedure upon personal property belonging to the defendant in the attachment action where such property is in the possession of a third party, but is subject to a lien so that actual custody of the property cannot be taken by the sheriff." The court is not required to determine in this action the legal effect of the service of the warrant of attachment and of the sheriff's notice of levy where, as here, it appears that plaintiff, in whose possession the goods were, had a lien thereon for unpaid storage charges. Nor is the plaintiff obliged to show that the sheriff, claimant, will probably succeed in establishing his claim. *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281, 286. The plaintiff is not required to decide at its peril whether the sheriff secured a lien or not against the property in its custody. It suffices if the claim rests upon a substantial basis. *Beebe v. Mead*, 101 App. Div. 500; 92 Supp. 51; *Crane v. McDonald*, 118 N. Y. 648. There must be judgment of interpleader for plaintiff.

RUDOLPH DEUTSCH, Plaintiff, v. WILLIAM L. BARRELL
COMPANY, Defendant

(Supreme Court, N. Y. Special Term, Part I, October 3, 1913)

Pleading; answer; insufficient denial; motion to strike out when answer also contains counterclaim; remedy; insufficient separate defenses; remedy by demurrer not motion.

1. When an answer contains a counterclaim, and also denials in a form not authorized by the Code, a motion cannot be entertained prior to the trial to strike out such denials, or for judgment, while such counterclaim stands.
2. The remedy in getting rid of insufficient separate defenses is by demurrer and not by motion to strike out under Code Civ. Pro., § 545.

Motion to strike out insufficient denials in the answer and for judgment.

Denied.

Booth & Ellis, attorneys for the plaintiff.

Mervyn Wolff, attorney for the defendant.

BIJUR, J.:

Motion to strike out as irrelevant and redundant a denial in a form not authorized by the Code and incomprehensible in fact, as well as three separate insufficient defenses. As to the three separate defenses the remedy is not to be sought in a motion to strike out under § 545, but by demurrer. See *Kavanaugh v. Commonwealth Trust Co.*, 181 N. Y. 121. Since the answer contains a counterclaim which, for the purposes of this motion at least, must be regarded as good, there seems, unfortunately to be no way of disposing of the insufficient denial in advance of the trial. It cannot be stricken out on motion because

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no such proceeding is authorized, and judgment cannot be had in the action while the counterclaim stands. See also *Rochkind v. Perlman*, 123 App. Div. 808; 108 Supp. 224,1151. Motion denied.

VILLAGE OF HAVERSTRAW, Respondent, v. J. ESLER
ECKERSON, Appellant, and others, defendants ¹

(158 App. Div. 419;143 Supp. 667)

Contempt; failure to fill in excavations so as to give lateral support to village street in compliance with judgment; procedure on motion for punishment

1. Where a judgment required a defendant to fill in an excavation so as to give lateral support to a village street, and the defendant had wholly failed to comply with the judgment,

¹ The decree requiring the defendant to fill in the excavation which removed the lateral support of the streets of the Village of Haverstraw was affirmed by the Appellate Division and the Court of Appeals without an opinion being rendered in either court. The complaint and the original decree made in the action will be found in 2 Bradbury's Pl. & Pr. Rep., at pages 130 and 136, respectively. The defendant not having complied with the decree the matter was again brought before the Special Term on a motion to punish the defendants for contempt. A number of defendants were involved, but the court finally determined that the defendant, J. Esler Eckerson, was the real party in interest as being the owner of the land where the excavation was made, and the contempt order was made against the defendant Eckerson alone. When the motion to punish the defendant for contempt was heard the court took oral testimony in addition to the affidavits which were presented by both sides. Two short decisions were rendered by Mr. Justice TOMPKINS, on the several motions, and those decisions will be found *post*, pages 360 and 361, respectively. For the other papers on which the motion to punish the defendant for contempt was based, see the following forms at the pages indicated: Principal Affidavit, page 343; Affidavit of Service, page 348; Notice Served with Judgment, page 350; Order to Show Cause, page 352; Order Adjudging Defendants Guilty of Contempt, page 354.

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and there was no testimony in the record as to the cost of performing the work which the defendant was required to do, it was held that such defendant should not be punished by having a fine inflicted upon him for a specific amount, but an order should be made that the defendant be imprisoned until he complied with the judgment, and the provision imposing a fine should be stricken out.

Appeal by the defendant J. Esler Eckerson from an order of the Supreme Court made at the Rockland County Special Term and entered in the office of the Clerk of the County of Rockland on the 4th day of October, 1912, adjudging the appellant guilty of a civil contempt of court.

Modified and affirmed.

Abram F. Servin for the appellant.

Alonzo Wheeler (William McCauley, with him on the brief), for the respondent.

BURR, J.:

The affidavits presented in this proceeding and the testimony taken therein clearly establish that it is within the power of defendant Eckerson to comply with the provisions of the judgment entered in the above-entitled action, requiring him to fill the excavation made upon his land to the extent prescribed by the said judgment, and that his refusal so to do is contumacious and willful. There is evidence from one of the tenants in occupation of a part of the land leased by him for brickmaking purposes, that there is nearly or quite sufficient refuse material on his land to make the necessary fill, and that when said tenant attempted to use the same for that purpose, defendant interfered to prevent him. This evidence is uncontradicted. The affidavits introduced by defendant

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relative to the necessity for fill upon the clay bottom are wholly irrelevant. That question was finally determined upon the trial of the action, and by the judgment entered therein. *Village of Haverstraw v. Eckerson*, No. 2, 140 App. Div. 896; 125 Supp 1148; aff'd 204 N. Y. 635.

The only questions open for discussion, therefore, arise in connection with the punishment inflicted. The fine of \$250, irrespective of proof of any actual loss or injury to plaintiff, was within the power of the court, and is justified. [Judiciary Law (Consol. Laws, chap. 30; Laws of 1909, chap. 35), § 773.] Equity also has inherent as well as statutory power to enforce compliance with its decrees by imprisoning a capable but contumacious defendant until he yields obedience. 4 Pom. Eq. Juris. (3d ed.) § 1317. The statute provides that "A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in either of the following cases: * * * 3. A party to the action * * * for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court." Judiciary Law, *supra*, § 753. "Where the misconduct proved consists of an omission to perform an act or duty, which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed." *Id.*, § 774. A judgment is a mandate of the court. Code Civ. Pro., § 3343, subd. 2. The judgment entered in the above-entitled action establishes the right of plaintiff as against defendant to lateral support of a public street to the extent specified therein, and defendant's disobedience to its requirements defeats, impairs, impedes or prejudices that right. It is proper,

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therefore, that defendant should be imprisoned until he obeys.

In addition thereto, "If an actual loss or injury has been produced to a party to an action * * * by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court." Judiciary Law, *supra*, § 773. If we assume that the exception has no application, the evidence introduced upon plaintiff's part as to the necessary cost of the fill is too vague and indefinite to afford a basis for measuring the extent of its loss or injury. Defendant Eckerson, however, states in his affidavit that the cost of the required fill will be at least \$15,000, and so far as the amount of the fine is concerned, this might be adopted if the evidence showed any present loss or injury to plaintiff resulting from defendant's failure to obey the provisions of the judgment in this regard. To affirmatively establish such actual loss or injury is essential. *Moffat v. Herman*, 116 N. Y. 131; *Socialistic Co-Operative Pub. Assn. v. Kuhn*, 164 id. 473; *Snow v. Shreffler*, 148 App. Div. 422, 433; 132 Supp. 895. It may be that plaintiff would have authority to go upon defendant's land and make the prescribed fill for the purpose of abating a nuisance. 2 Wood Nuis. (3d ed.) 1285, but it has not done so. Up to the present time it has expended nothing for that purpose. If the fine of \$20,000 which has been imposed, and which was intended to represent the cost of the fill, was paid over to plaintiff, there is no certainty that it would be expended for that purpose. Because, therefore, there is no satisfactory evidence of actual present loss or injury to plaintiff, the order must be modified by striking out the provision for the fine of \$20,000 and by making the provision for defendant's imprisonment until compliance

Principal Affidavit

with the judgment absolute, instead of in the alternative to the payment of said fine; and as thus modified it should be affirmed, without costs.

JENKS, P. J., THOMAS, CARR and PUTNAM, JJ., concurred.

Order modified by striking out the provision for the fine of \$20,000, and by making the provision for defendant's imprisonment until compliance with the judgment absolute instead of in the alternative to the payment of said fine; and as thus modified affirmed, without costs.

Form No. 31

Affidavit; Motion to Punish Defendants for Contempt for Failure to Comply with Final Decree Requiring the Filling in of Excavation; Lateral Support of Village Street¹

Supreme Court, Rockland County.

The Village of Haverstraw,	}	Jefferson Street Case.
Plaintiff,		
against		
J. Esler Eckerson, and others,		
Defendants.		

County of Rockland, ss.:

ALONZO WHEELER, being duly sworn, deposes and says, that he is the attorney for the plaintiff in the above en-

¹ From *Village of Haverstraw v. Eckerson*, 158 App. Div. 419; 143 Supp. 667. See *ante*, page 339 and note. For Affidavit of Service, see *post*, page 348. For Notice Served with Original Judgment see *post*, page 350. For Order to Show Cause see *post*, page 352. For Order Adjudging Defendants Guilty of Contempt, see *post*, page 354. For Decisions of Court at Special Term, on Motion to Adjudge Defendants Guilty of Contempt, see *post*, pages 360 and 361.

Principal Affidavit

titled action, his office and place of business being at Haverstraw, in said County; that said action was brought July 3d, 1907, to procure the judgment of this Court perpetually enjoining and restraining the defendants from excavating and removing the materials forming the lateral support of Jefferson Street, one of the public streets of said village, along the north side and at the easterly end thereof, and to compel the defendants to fill in and restore the necessary lateral support of said street, where it had theretofore been removed or otherwise destroyed by them; all of which will more fully and at length appear from the complaint in said action; that the defendants duly appeared in said action by R. E. and A. J. Prime, Esqs., their attorneys, whose office and place of business are at Yonkers, New York, and in due time interposed and served an answer and an amended answer to said complaint; that thereafter, to wit, in or about September, 1908, Abram F. Servin, Esq., whose office and place of business are at Middletown, New York, was, by an order of this court, duly substituted as attorney for the defendants in the place and instead of their original attorneys; that the issues raised by the pleadings herein were thereafter, to wit, April 29, 1909, duly brought to trial and tried before Mr. Justice TOMPKINS at Special Term held at the Court House, in said county, and on subsequent days to which said trial was adjourned; that said Justice upon and after the submission of said action made and filed his findings of fact and conclusions of law therein, wherein he found and decided, among other things, that a slope in sand of two and one-half feet horizontal to one foot vertical, and in clay of four feet horizontal to one foot vertical, along the northerly line of said street and at the easterly end thereof upon the adjoining land of said defendant, J. Esler Eckerson, is necessary for the support and safety of said street, and to prevent the same from subsiding and sliding down upon said adjoining property; provided, however, the clay is not exca-

Principal Affidavit

vated and removed therefrom to a greater depth than fifty-eight feet below said street, or twenty feet below highwater mark of the Hudson River; and that below that depth the clay is hydrated, soft and unstable, and has very little, if any, resisting power; and that where the clay has been excavated to a greater depth upon said adjoining land no slope will support and sustain said street; that the defendants herein had wrongfully and unlawfully excavated and removed much of the materials forming the necessary lateral support of said street, and had excavated and removed clay from said adjoining property to a greater depth in places than fifty-eight feet below the surface of said street, and that by the excavation and removal of such materials had rendered said street unsafe and dangerous for public use and travel, and liable to subside and slide down upon said adjoining property; that the plaintiff was entitled to the relief demanded in the complaint and to the judgment of this Court perpetually enjoining and restraining said defendants, and each of them, from excavating and removing any of the materials from said adjoining property, which formed the necessary lateral support to said street, and directing them forthwith to fill in and restore the lateral support of said street, where it had been taken away and removed as aforesaid; and, also, directing said defendants to fill in said excavations so that the bottom thereof should not be more than fifty-eight feet below the surface of said street, and directing that judgment be accordingly entered herein; that thereafter, to wit: on August 17, 1909, judgment was duly filed and entered herein, in Rockland County Clerk's Office, in accordance with the findings and decision of the court, as aforesaid; and that on the same day the judgment roll in said action was, also, duly filed in said Clerk's office, and is now of record therein; that thereafter, to wit: on or about August 18, 1909, correct and true copies of the findings and decisions of the court and of the judgment entered thereon, as

Principal Affidavit

aforesaid, together with written notice of such entry and filing, were duly served upon the defendants' said attorney by mail; that deponent begs leave to refer to and read upon this application, the judgment roll in said action, and each and all of the papers comprising the same, on file and of record in Rockland County Clerk's office, as aforesaid; that thereafter and on or about the 3d day of September, 1909, the defendants served upon the deponent notice of appeal from the judgment of the Special Term of the Supreme Court to the Appellate Division of the Supreme Court for the Second Judicial Department; that the Appellate Division, aforesaid, thereafter decided said appeal from the judgment of Special Term of the Supreme Court unanimously in favor of the plaintiff-respondent; that the judgment of the Appellate Division was duly entered in the office of the Clerk of the County of Rockland on the 17th day of October, 1910, affirming the final judgment of the Special Term of the Supreme Court, entered in said Clerk's office on August 17, 1909, as aforesaid; and on the 18th day of October, 1910, a copy of the judgment and notice of entry thereof, together with a copy of the order of affirmance on appeal from said judgment of the Special Term, were personally served upon defendants-appellants' attorney, Abram F. Servin, Esq., at his office in Middletown, N. Y.; that thereafter and on or about the 21st day of October, 1910, the attorney for the defendants-appellants served or caused to be served, upon deponent a notice of appeal to the Court of Appeals from the judgment of the Appellate Division, aforesaid; that said Court of Appeals affirmed the judgments of the Special Term of the Supreme Court and of the Appellate Division; that upon the decision and remittitur of the Court of Appeals the judgment on affirmance was entered in Rockland County Clerk's office on the 19th day of February, 1912, that thereafter and on or about the 6th and 7th days of March, 1912, a notice requiring defendants to comply with, carry

Principal Affidavit

out and obey the directions and provisions of the judgment of the Supreme Court, together with certified copies of the original judgment and the judgment on affirmance in the Court of Appeals, were personally served upon and left with each and all of the defendants herein by Michael Ford, a police officer of the said village, as will appear by his affidavit, proving such service, hereunto annexed; that the defendants have wholly failed and neglected to observe, comply with and carry out the provisions and requirements of said judgment, and have wrongfully refused so to do; that by reason of their refusal to obey said judgment and to fill in and restore the lateral support of said street where it has been interfered with and removed, as aforesaid, and the bottom of the excavations upon said adjoining property, as they are directed and required to do in and by said judgment, there is grave danger that said street may, at any time, subside and slide down into such excavations and to be thereby wholly destroyed; and there is also grave danger that many dwellings which stand upon and along the southerly side of said street, most, if not all, of which are occupied, may be carried away and destroyed as the result of any such impending slide with great loss of life and property; that if said street is carried away and destroyed in any such impending slide, it will be practically impossible to restore the same.

Deponent further says, that a previous application was made for the order asked for herein but that the same was denied, without prejudice, pending the defendants' appeal to the Appellate Division; and also, that a notice of less than eight days is expedient and necessary in order that this motion may be speedily heard and determined, and before any slide may occur which may wholly or in part destroy said street; and, also, that this deponent is duly authorized by the plaintiff herein, and by its officers, to make this application and take this proceeding for and on its behalf to punish the defendants, and each of them, for contempt of court for their wrongful neglect

Affidavit of Service

and refusal to comply with and obey the judgment of this court, granted and entered herein, and subsequently and upon appeal, duly affirmed by both the Appellate Division of the Supreme Court for the Second Judicial Department and the Court of Appeals, as aforesaid.

WHEREFORE, this deponent demands that the defendants herein, and each of them, be punished as for a contempt of court, for their neglect and refusal to comply with and obey the judgment entered herein, as aforesaid; and that they be required to show cause before this court why they should not be so punished.

ALONZO WHEELER.

Sworn to before me this 13th }
 day of April, 1912. }
 James F. McCabe,
 Notary Public,
 (Seal.)

Form No. 32

Affidavit of Service; Motion to Punish Defendants for Contempt for Failure to Comply with Final Decree Requiring the Filling in of Excavation; Lateral Support of Village Street¹

Supreme Court, Rockland County.

The Village of Haverstraw,
 Plaintiff,
 against
 J. Esler Eckerson, and others,
 Defendants.

Jefferson Street
 Case.

County of Rockland, ss.:

MICHAEL FORD, being duly sworn, deposes and says,

¹ From *Village of Haverstraw v. Eckerson*, 158 App. Div. 419; 143 Supp. 667. See *ante*, page 339 and note. For Principal Affidavit, see *ante*, page 343. For Notice Served with Original Judgment see *post*, page 350. For Order to Show Cause, see *post*, page 352. For Order

Affidavit of Service

that he is a police officer in and for the Village of Haverstraw, and has been for several years last past; that on the 6th day of March, 1912, Alonzo Wheeler, attorney for the plaintiff in this action, caused to be delivered to him for service upon each and all of the defendants herein, notices requiring such defendants to forthwith observe, comply with, and carry out the directions and provisions of the judgments of the Supreme Court and of the Court of Appeals, and duly certified copies of the judgment of the Supreme Court rendered in said action and filed and entered therein in Rockland County Clerk's office on the 17th day of August, 1909, and of the judgment on affirmance entered and filed, upon the decision and remittitur of the Court of Appeals, in said Clerk's office on the 19th day of February, 1912; and instructed deponent to serve a notice and one of each of such certified copies of said judgments on each of defendants personally; that thereafter deponent delivered to and left with the defendants hereinafter named at the places and on the dates specified, personally, the notice above mentioned and one certified copy of each of the above-mentioned judgments:

John Nicholson, at Haverstraw, N. Y., on March 6, 1912.

John H. O'Brien, at Haverstraw, N. Y., on March 6, 1912.

Thomas Tanney, at Haverstraw, N. Y., on March 6, 1912.

Bessie Bennett, at Haverstraw, N. Y., on March 7, 1912.

Edward N. Renn, at Haverstraw, N. Y., on March 7, 1912.

Patrick J. Lynch, at Haverstraw, N. Y., on March 7, 1912.

Adjudging Defendants Guilty of Contempt, see *post*, page 354. For decisions of Court at Special Term, on motion to adjudge defendants guilty of contempt, see *post*, pages 360 and 361.

 Notice Served with Judgment

J. Esler Eckerson, at Haverstraw, N. Y., on March 7, 1912.

And deponent further says that he is personally acquainted with each and all of the said defendants herein, and knew the persons so served, as aforesaid, to be such defendants; that he is upwards of twenty-one years of age.

MICHAEL FORD.

Sworn to before me this 13th }
day of April, 1912.

James F. McCabe,

Notary Public,

(Seal.)

 Form No. 33

Notice Served with Original Judgment; Motion to Punish Defendants for Contempt for Failure to Comply with Final Decree Requiring the Filling in of Excavation; Lateral Support of Village Street ¹

Supreme Court, Rockland County.

The Village of Haverstraw,
Plaintiff,
against
J. Esler Eckerson and others,
Defendants.

Jefferson St. Case,
No. 2.

To the above-named defendants:

You, and each of you, are hereby notified, that annexed hereto and herewith served upon you is a duly certified copy of the original judgment entered in the above-

¹ From *Village of Haverstraw v. Eckerson*, 158 App. Div. 419; 143 Supp. 667. See *ante*, page 339 and note. For Principal Affidavit, see *ante*, page 343. For Affidavit of Service, see *ante*, page 348. For Order to Show Cause see *post*, page 352. For Order Adjudging Defendant Guilty of Contempt, see *post*, page 354. For decisions of Court at Special Term, on motion to adjudge defendants guilty of contempt, see *post*, pages 360 and 361.

Notice Served with Judgment

entitled action in the office of the Clerk of the County of Rockland, at New City, in said County, on the seventeenth day of August, 1909, and of the judgment affirming the same, entered upon the decision and remittitur of the Court of Appeals, in the same office on the nineteenth day of February, 1912; and you are hereby further notified and required forthwith to fill in and restore the slope upon and along the northerly side of Jefferson Street, and at the easterly end thereof, where the same has been removed or otherwise interfered with, so that such slope shall be two and one-half feet horizontal to one foot vertical in sand, and four feet horizontal to one foot vertical in clay, and to fill in the bottoms of the clay pits and excavations upon the adjoining land of the defendant J. Esler Eckerson, so that they shall not be deeper than twenty feet below high water mark of the Hudson River, as you are directed and required to do in and by the original judgment, first above mentioned; and you are hereby further notified and required forthwith to comply with, carry out, and obey the provisions and directions of said original judgment; and that in default of your so doing an application will be made to the Supreme Court, to punish you as for a contempt of court, and to compel your obedience to the requirements of said judgment.

Dated March 6th, 1912.

Yours, &c.,

ALONZO WHEELER,

Attorney for the Village of Haverstraw,
the plaintiff above named.

Order to Show Cause

Form No. 34

Order to Show Cause; Motion to Punish Defendants for Contempt
for Failure to Comply with Final Decree Requiring the Filling in
of Excavation; Lateral Support of Village Street ¹

Supreme Court, Rockland County.

The Village of Haverstraw, Plaintiff, against J. Esler Eckerson, and others, Defendants.	} Jefferson Street Case
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Upon the affidavits of Alonzo Wheeler, attorney for the plaintiff herein, and Michael Ford, severally verified on the 13th day of April, 1912, which are hereto annexed; and upon the judgment roll herein and all other papers and proceedings, let the defendants herein, and each of them, show cause before the Supreme Court, at a Special Term thereof to be held in and for the County of Rockland at the Supreme Court Chambers in the Village of Nyack, N. Y., on the 20th day of April, 1912, at the opening of court on that day, or as soon thereafter as counsel can be heard, why said defendants, and each of them, should not be punished for contempt of court for their wrongful neglect and refusal to fill in and restore the lateral support of Jefferson Street, and the excavations upon the adjoining property of the defendant, J. Esler Eckerson, as they are directed and required to do in and by the judgment granted herein on the 17th day of Au-

¹ From *Village of Haverstraw v. Eckerson*, 158 App. Div. 419; 143 Supp. 667. See *ante*, page 339 and note. For Principal Affidavit, see *ante*, page 343. For Affidavit of Service, see *ante*, page 348. For Notice Served with Original Judgment, see *ante*, page 350. For Order Adjudging Defendants Guilty of Contempt, see *post*, page 354. For decisions of Court at Special Term, on motion to adjudge defendants guilty of contempt, see *post*, pages 360 and 361.

Order to Show Cause

gust, 1909, and duly entered and filed in Rockland County Clerk's Office, a certified copy of which is hereunto annexed, which judgment was affirmed by the Appellate Division and by the Court of Appeals and the judgment on affirmance entered upon the decision and remittitur of the said Court of Appeals, in the same office, on the 19th day of February, 1912, a certified copy of which judgment on affirmance is also hereunto annexed; and, also for their wrongful neglect and refusal to comply with, carry out, and obey said first above-mentioned judgment—the judgment of the Court of Appeals having been duly made the judgment of the Supreme Court—and each and all of the requirements thereof; and why the plaintiff herein should not have such further order and relief in the premises as to the court shall seem meet and proper.

And it appearing that sufficient reason exists therefor, it is further ordered that service of a copy of this order and of the affidavits and notice to defendants to comply with requirements of the judgment herein upon which this order is granted, as aforesaid upon said defendants on or before the 17th day of April, 1912, shall be deemed a sufficient service.

Dated April 15th, 1912.

ARTHUR S. TOMPKINS,
J. S. C.

Order Adjudging Defendants Guilty of Contempt

Form No. 35

Order Adjudging Defendants Guilty of Contempt; Motion to Punish Defendants for Contempt for Failure to Comply with Final Degree Requiring the Filling in of Excavation; Lateral Support of Village Street ¹

At a Special Term of the Supreme Court held at the Supreme Court Chambers, in the Village of Nyack, Rockland County, New York, on the 28th day of September, 1912.

Present: Hon. ARTHUR S. TOMPKINS, *Justice*.
Supreme Court, Rockland County.

The Village of Haverstraw,
Plaintiff,

against

J. Esler Eckerson, John H.
O'Brien, Patrick J. Lynch,
Thomas Tanney, John Reilly,
Edward N. Renn, John
Nicholson, Bessie Bennett,
and Thomas Coyne,
Defendants.

On reading and filing the order to show cause herein bearing date April 15, 1912, and returnable before this Court at a Special Term thereof, held at Supreme Court Chambers, in the Village of Nyack, on the 20th day of April, 1912; and the affidavit of Alonzo Wheeler, attorney for the plaintiff, verified on the 13th day of April, 1912,

¹ From *Village of Haverstraw v. Eckerson*, 158 App. Div. 419; 143 Supp. 667. See *ante*, page 339 and note. For Principal Affidavit, see *ante*, page 343. For Affidavit of Service see *ante*, page 348. For Notice Served with Original Judgment see *ante*, page 350. For Order to Show Cause, see *ante*, page 352. For decisions of Court at Special Term on motion to adjudge defendants guilty of contempt, see *post*, pages 360 and 361.

Order Adjudging Defendants Guilty of Contempt

and the affidavit of Michael Ford, verified on the same day, and the notice thereto annexed; and upon the judgment entered in said action on the 17th day of August, 1909; and upon the decision and order of the Appellate Division, upon the appeal therefrom, and the judgment of affirmance entered thereon October 17, 1910; and upon the decision of the Court of Appeals, upon the appeal from said judgment, and the judgment of affirmance entered thereon February 19, 1912, being the judgments and orders mentioned and referred to in the affidavit of Michael Ford, above mentioned, and duly certified copies of which were served by him upon each and all of the defendants, as set forth and stated in his said affidavit; and upon the judgment roll in said action filed in Rockland County Clerk's office August 17, 1909, and the judgment of affirmance, on appeal, above mentioned, now of record therein, upon which papers, hereinbefore mentioned, the said order to show cause was granted, and all of which were read in support of the motion; and on reading and filing due proof of the due service of said order to show cause, and papers upon which the same were granted, as aforesaid, upon each and all of the defendants herein, and upon Abram F. Servin, Esq., their attorney; and upon the affidavit of J. Esler Eckerson, verified on the 27th day of April, 1912; and the affidavits of Brewster J. Allison and Thomas Murray, severally verified on the 25th day of April, 1912, and the affidavits of Harry Richards, James H. Brown, William C. Swann, Patrick J. Sullivan, George W. Mott, Albert B. Brown, and James H. Hailstock, severally verified on the 24th day of April, 1912, and the affidavit of Edward Snedeker, verified on the 22d day of April, 1912; all of which were read in opposition to the motion; and upon the affidavit of Alonzo Wheeler verified May 2d, 1912, and read in reply; and the Court, after hearing Alonzo Wheeler, attorney for the plaintiff, in favor of the motion, and Abram F. Servin, Esq., attorney for the defendant,

Order Adjudging Defendants Guilty of Contempt

J. Esler Eckerson, and Harvey DeBaun, Esq., attorney for the defendants, Patrick J. Lynch, John H. O'Brien, Edward N. Renn and Thomas Tanney; and Walter C. Anthony, Esq., attorney for the defendant, John Nicholson, in opposition thereto; and, after due consideration, having found and decided that each and all of the defendants, except Bessie Bennett, who is now deceased, are guilty of the contempt of court charged against them; and the Court having thereupon adjourned this proceeding to June 15, 1912, to afford the defendants further time and opportunity to purge themselves of the contempt of court, of which they were found guilty, as aforesaid; and the proceeding, pursuant to such adjournment, coming on at that time for further hearing; and Alonzo Wheeler having appeared as attorney and William McCauley, as counsel, for the plaintiff; and Abram F. Servin, Esq., having appeared as attorney for said defendant, J. Esler Eckerson; and the remaining defendants, now living, having appeared in person and by their respective attorneys, above mentioned, and the Court, after further hearing of counsel for the respective parties, and, after due consideration of the evidence and testimony submitted by them, having found and decided that the defendant, J. Esler Eckerson, was and is guilty of the contempt of court charged against him, and that his co-defendants are thus far innocent of any intentional violation of the terms and provisions of the judgment herein; and, therefore, are not guilty of the contempt of court charged against them; and the Court having again duly adjourned this proceeding to a Special Term to be held on Friday, the second day of August, 1912, at White Plains, New York, to afford the defendant, J. Esler Eckerson, further time and opportunity to do a substantial part of the work required by said judgment; and, pursuant to such adjournment, the proceeding coming on for further hearing; and the attorneys for the respective parties having duly appeared; and it being made to appear to the satisfaction of the Court

Order Adjudging Defendants Guilty of Contempt

that said defendant, J. Esler Eckerson, had wilfully and deliberately refused to comply with the provisions and requirements of said judgment, notwithstanding the time and opportunity given him, as aforesaid; and the Court having found and decided, from the evidence and testimony submitted, as aforesaid, that the work required by said judgment will cost twenty thousand dollars (\$20,000.00); and this Court, after due consideration, being satisfied, and having found and decided that said defendant, J. Esler Eckerson has committed the offense and is guilty of the misconduct and contempt of court charged against him, in having wilfully disobeyed the provisions and requirements of the judgment entered herein in Rockland County Clerk's office, August 17, 1909, namely, the direction therein that said defendants forthwith fill in and restore the necessary lateral support of Jefferson Street, where the same has been wholly or in part removed, or otherwise interfered with, along the northerly side and at the easterly end thereof, upon the adjoining land of said defendant, J. Esler Eckerson, and so that it shall have the slope found to be necessary for its support in and by said judgment; and the further direction in said judgment that said defendants fill in the excavations upon said adjoining property, wherever necessary, so that the bottom thereof shall not be deeper than twenty feet below high water mark of the Hudson River; and the Court having found and decided that the misconduct of said defendant, J. Esler Eckerson, was calculated to and did actually defeat, impair, impede and prejudice the rights and remedies of the plaintiff herein; and the Court having also found and decided that the plaintiff herein has suffered an actual loss or injury to the amount of twenty thousand dollars (\$20,000.00) by reason of the misconduct proved against said defendant, J. Esler Eckerson; and the Court having further found and decided that the remaining defendants, who are now living, are thus far innocent of any intentional misconduct or contempt of

Order Adjudging Defendants Guilty of Contempt

court, and that the enforcement of said judgment against them should be suspended;

Now, on motion of Alonzo Wheeler, attorney for the plaintiff, it is hereby

ORDERED, ADJUDGED and DECREED, that the defendant, J. Esler Eckerson, has committed the offense, and is guilty of the misconduct and contempt of court charged against him in having wilfully disobeyed the provisions and requirements of the judgment entered herein in Rockland County Clerk's office, August 17th, 1909, namely, the direction therein that the defendants, and each of them, forthwith fill in and restore the necessary lateral support of Jefferson Street, where the same has been wholly or in part removed or otherwise interfered with, along the northerly side and at the easterly end thereof, upon the adjoining land of said defendant, J. Esler Eckerson, and so that it shall have the slope found to be necessary for its support in and by said judgment; and the further direction in said judgment that said defendants, and each of them, fill in the excavations upon said land, wherever necessary, so that the bottom thereof shall not be deeper than twenty feet below high water mark of the Hudson River; and, it is further

ORDERED, ADJUDGED and DECREED, that the misconduct of said defendant, J. Esler Eckerson, and the offense committed by him, as aforesaid, was calculated to, and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff herein; and that the plaintiff has suffered an actual loss or injury to the amount of twenty thousand dollars, (\$20,000.00) by reason of the misconduct proved against said defendant, J. Esler Eckerson, and of which he is found guilty, as aforesaid; and it appearing that the misconduct of said defendant consists of an omission to perform an act or duty which it is yet in his power to perform, it is, therefore, further

ORDERED, ADJUDGED and DECREED, that a fine of twenty thousand dollars (\$20,000.00) be and the same

Order Adjudging Defendants Guilty of Contempt

hereby is imposed upon said defendant, J. Esler Eckerson, for the misconduct and contempt of court, of which he is found guilty, as aforesaid; and, that in addition thereto, he pay a fine of two hundred and fifty dollars (\$250.00), which is hereby imposed upon him, for the plaintiff's costs and expenses of this proceeding; and it is further

ORDERED, ADJUDGED and DECREED, that the Sheriff of the County of Rockland be and hereby is directed, upon delivery to him of a duly certified copy of this order, to collect the fines hereby imposed upon said defendant, and pay the same over to the plaintiff herein; and it is further

ORDERED, ADJUDGED and DECREED, that said defendant, J. Esler Eckerson, be imprisoned in the County Jail of the County of Rockland until he shall have paid the fines hereby imposed, as aforesaid, or until he shall have complied with and performed all of the provisions and requirements of said judgment, hereinbefore mentioned; and that the Sheriff of said County of Rockland be, and hereby is, directed and required, upon delivery to him of a duly certified copy of this order, forthwith to arrest said defendant, and to commit him to the said County Jail, and there detain him in close custody until he shall have paid said fines or complied with said judgment, as aforesaid; and it is further

ORDERED, ADJUDGED and DECREED, that the enforcement of said judgment as against the remaining defendants, be and the same is hereby suspended until the further direction of this Court in the premises.

Enter,
A. S. T.,
J. S. C.

OPINION, April, 1912 ¹

TOMPKINS, J.:

It is nearly three months since the judgment in this action was affirmed by the Court of Appeals, and more than two months have passed since a certified copy of the judgment and a notice to forthwith observe and comply with its provisions were personally served upon each of the defendants. Up to the present time no effort has been made by any defendant to carry out the directions and provisions of said judgment, and each of the defendants is in contempt of court, except the defendant Bessie Bennett, recently deceased; and no sufficient excuse is offered on this motion by any defendant for his failure to obey the judgment. This judgment was made to be enforced for the protection of public streets, and private property and human lives, and no pretense will be accepted as performance or as an excuse for failure to perform.

The defendants have already had sufficient time in which to comply with the conditions of the judgment, or at least to show their purpose so to do. The plaintiff's motion to punish the defendants for contempt of court is granted as to each of the living defendants, and they will be given until Saturday, June fifteenth, in which to purge themselves of their contempt of court by full compliance with the provisions and requirements of said judgment, and the matter will be held open until that day for the fixing by the Court of the punishment to be inflicted upon the defendants for their said contempt of

¹ From *Village of Haverstraw v. Eckerson*, 158 App. Div. 419; 143 Supp. 667. See *ante*, page 339 and note. For Principal Affidavit, see *ante*, page 343. For Affidavit of Service, see *ante*, page 348. For Notice Served with Original Judgment, see *ante*, page 350. For Order to Show Cause, see *ante*, page 352. For Order Adjudging Defendant Guilty of Contempt, see *ante*, page 354. For Additional decision of Court at Special Term on motion to adjudge defendants guilty of contempt, see *post*, page 361.

Second Opinion

court, in the event of their failure to comply by that time with the provisions of said judgment, and for the making of the final order on this motion.

OPINION, June, 1912 ¹

TOMPKINS, J.:

I am satisfied that the tenants are innocent of any intentional violation of the terms of the judgment in this action. What they have done has been by direction of their landlord, the defendant Eckerson, and upon his assurance that they were acting within their rights, and that he would fully protect them. When they were served with the summons in this action, they were told by the defendant Eckerson that he would take care of their interests and that they need give no attention to the suit; and while there may be some question whether they were justified in relying upon such assurance, nevertheless, I am convinced that they have intended no disobedience to the Court's injunction.

It does not seem to me equitable or fair that they or any of them, should be required to undertake the very large expense of filling in the Eckerson property, so as to establish the slope required by the judgment, and restore the bottom of the excavation to a depth of not more than twenty (20) feet below high water mark. They must, however, at once, cease excavating anywhere upon the Eckerson property north of Jefferson Street where the excavation is already deeper than twenty (20) feet below high-water mark, and wherever such excavation would interfere with the slope required by the judgment for the

¹ From *Village of Haverstraw v. Eckerson*, 158 App. Div. 419; 143 Supp. 667. See *ante*, page 339 and note. For Principal Affidavit, see *ante*, page 343. For Affidavit of Service, see *ante*, page 348. For Notice Served with Original Judgment, see *ante*, page 350. For Order to Show Cause, see *ante*, page 352. For Order Adjudging Defendant Guilty of Contempt, see *ante*, page 354. For additional decision of Court at Special Term, on motion to adjudge defendants guilty of contempt, see *ante*, page 360.

Second Opinion

protection of Jefferson Street, including the extreme easterly end thereof. The provision of the judgment with respect to the twenty (20) feet below high water mark applies to all of the original Eckerson property north of Jefferson Street, and northeast of the present easterly end thereof. It is the deep excavation east and northeast of the easterly end of Jefferson Street, as it now is, that is the most dangerous and most likely to cause Jefferson Street to cave in.

The defendant Eckerson has deliberately and wilfully violated the provisions of the judgment, and is in contempt of Court, and besides is a fugitive from justice, having paid no attention whatever to the judgment or the order of the Court heretofore made adjudging him guilty of contempt of Court, but giving him until June 15th in which to purge himself of complying with the provisions and requirements of the judgment. For more than three months now, the defendant Eckerson has deliberately disregarded the provisions and directions of the judgment, and although a month and a half has passed since he was adjudged in contempt of Court, he has made no attempt to purge himself thereof, nor has he undertaken in any way to comply with the judgment. On the contrary, he has left the property, which formerly he gave his personal attention to, in the charge of others, and has left the State of New York and is sojourning in New Jersey. He has even forbidden his tenants to obey the terms of the judgment. His conduct is without excuse, and his continued refusal to obey the judgment renders the people who live on or near Jefferson Street in imminent danger by the sliding of the street and their property into the excavation.

The testimony given upon the hearing of this motion shows that the work required by the judgment will cost twenty thousand dollars (\$20,000) or more.

The defendant Eckerson will now be given one month within which to do a substantial part of the work required by the judgment—sufficient to show his good faith and

Statement of the Case

the sincerity of his effort. If at the end of that time the work has not been done, or a substantial part of it has not been accomplished, I will either impose a fine upon the defendant Eckerson sufficient to reimburse the Village of Haverstraw for the cost of doing the work required by the judgment, or will direct the Sheriff of the County to go upon the premises and carry out the terms of the judgment, and fix the cost thereof as a fine to be paid by the defendant Eckerson for his misconduct and contempt of Court.

To give effect to this decision, this motion will stand adjourned to a Special Term to be held on the first Friday of August, at White Plains, New York, at which time a final order will be made upon this motion. In the meantime this proceeding will be suspended as to the tenants, upon condition that they desist from further excavation upon the Eckerson premises north of Jefferson Street and west of the Hudson River.

BUYERS', SELLERS', AUTOMOBILE Co., INC., Plaintiff, v.
MILLER BRISBEN Co., INC., Defendant

(City Court of the City of N. Y., September 16, 1913)

Answer: defense; promissory note payable otherwise than specified on its face; motion for judgment on the pleadings

1. In an action on a promissory note the rule that the terms of a written contract may be modified by a contemporaneous parol agreement does not apply so as to admit evidence that the note was payable otherwise than specified on its face, and as such a defense set up on the answer is insufficient, it was held that a motion by the plaintiff for judgment on the pleadings should be granted, where the defendant interposed an answer containing such a defense.

Motion by the plaintiff for judgment on the pleadings.
Granted.

Statement of the Case

Louis B. Williams, attorney for the plaintiff.

J. Lester Fierman, attorney for the defendant.

DELEHANTY, J.:

The real question involved in this application hinges upon the sufficiency of the separate defense pleaded. I am satisfied from an examination of the authorities that such defense is insufficient for the reason that it alleges facts tending to establish a contemporaneous verbal agreement that the note sued upon should be paid in a manner different from the terms of the written instrument, and evidence thereof would be inadmissible upon the trial of the action. I am aware that there are cases that conditions limiting and circumscribing the delivery of written instruments may be shown by parol, but such, in my opinion, are not applicable to the facts presented herein. I have concluded, therefore, to grant the motion for judgment upon the pleadings. Order signed.

JOHN BARDES et al., Respondents, v. MARTIN HERMAN,
Appellant ¹

(207 N. Y. 745; aff'g without opinion, 144 App. Div. 772; 129 Supp. 723; aff'g 62 Misc. 428; 114 Supp. 1098)

Vendor and purchaser; specific performance; title to lands between high and low water mark; easement of public; grant by State

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 12, 1911, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

¹ For Complaint from this case, see *post*, page 365.

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Selden Bacon and Saul S. Myers for appellant.

William Allaire Shortt for respondents.

Judgment affirmed, with costs, on opinion of BURR, J., below.

Concur: CULLEN, Ch. J., GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE and COLLIN, JJ.

FORM NO. 36

Complaint; Vendor and Purchaser; Specific Performance; Title to Lands between High and Low Water Mark; Easement of Public; Grant by State; Vendor against Purchaser.¹

Supreme Court, Richmond County.

John Bardes and George W. Stake, Plaintiffs, against Martin Herman, Defendant.	}
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The plaintiffs, by William Allaire Shortt their Attorney, complain of the defendant and allege:

I. That on and before the 17th day of January, 1907, plaintiffs were and still are the owners in fee and possessed

¹ From *Bardes v. Herman*, 207 N. Y. 745; aff'g without opinion 144 App. Div. 772; 129 Supp. 723; aff'g 62 Misc. 428; 114 Supp. 1098. See *ante*, page 364.

For note on ENFORCEMENT OF DECREE OF SPECIFIC PERFORMANCE AGAINST A PURCHASER, see "Bench and Bar," November, 1913, page 6.

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of the real property situated in the County of Richmond and State of New York described in the agreement hereinafter set forth.

II. That the defendant being desirous of purchasing the same, entered into an agreement in writing with the plaintiffs, dated on said 17th day of January, 1907, of which the following is a copy:

AGREEMENT made the 17th day of January in the year one thousand nine hundred and seven between John Bardes and George W. Stake, of the Borough of Richmond, in the City of New York, parties of the first part, and Martin Herman party of the second part, in manner following: The said parties of the first part, in consideration of the sum of Nine thousand five hundred dollars, to be fully paid as hereinafter mentioned, hereby agree to sell unto the said party of the second part, ALL that certain plot of land situate in the Second Ward of the Borough of Richmond, County of Richmond and State of New York, bounded and described as follows: BEGINNING at corner formed by the intersection of the southerly side of Wave Street and the easterly side of Bay Street and running thence easterly along the southerly side of Wave Street, 116 feet, thence running southerly parallel with Bay Street, 75 feet, thence westerly and parallel with Wave Street, 116 feet to the easterly side of Bay Street and thence northerly along the easterly side of Bay Street 75 feet to the point of beginning.

And the said party of the second part hereby agrees to purchase said premises at the said consideration of Nine thousand five hundred dollars, and to pay the same as follows: Five hundred dollars on the execution and delivery of this agreement. Six thousand five hundred dollars by the execution and delivery of a bond of six thousand five hundred dollars payable on or before three years from the date thereof, with all the usual clauses, and bearing interest at the rate of 5% per annum, and a purchase money mortgage on the aforesaid premises with the same

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condition as said bond, said bond and mortgage to be drawn and recorded by the Attorneys of the parties of the first part at the expense of the party of the second part, the mortgage tax to be paid by the party of the second part. Two thousand five hundred dollars in cash on the delivery of the Deed as hereinafter mentioned.

And the said parties of the first part, on receiving such payment and bond and mortgage at the time and in the manner above mentioned, shall, at their own proper costs and expenses, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered to the said party of the second part, or to his assigns, a proper deed containing a general warranty and the usual full covenants for the conveying and assuring to him or them the fee simple of the said premises, free from all encumbrances which deed shall conform to the requirements of the Real Property Law of the State of New York, relating to short forms of deeds, as far as the same is applicable thereto, which deed shall be delivered on the 15th day of April, 1907, at 9 o'clock A. M., at the office of the Title Guarantee & Trust Co., 176 Broadway, N. Y., with privileges to close at an earlier date on five days' notice to the parties of the first part.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands and seals the day and year first above written.

JOHN BARDES (Seal).

GEO. W. STAKE (Seal).

MARTIN HERMAN (Seal).

Sealed and delivered in the
presence of
as to John Bardes and Geo. W. Stake.

GUSTAV A. BARTH.

JOHN W. HAHNER.

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State of New York,
Borough of Richmond,
County of Richmond,

} ss:

On the 17th day of January in the year one thousand nine hundred and seven before me personally came John Bardes and George W. Stake, to me known, and known to me to be the individuals described in, and who executed the foregoing instrument, and they severally acknowledged that they executed the same.

GUSTAV A. BARTH,
Notary Public of
Richmond County.

III. That the defendant on the execution of said agreement, paid to the plaintiffs the said sum of \$500 as therein provided for.

IV. That the plaintiffs have always been and still are ready and willing to perform the said agreement on their part; that on the said 15th day of April, 1907, at 9 o'clock A. M., at the office of the said The Title Guarantee and Trust Company, No. 176 Broadway, New York, the plaintiffs tendered to the defendant a deed of the said premises pursuant to and in accordance with the terms of the said agreement and then and there demanded of the balance of the purchase money, to wit, \$2,500 in cash and the execution by the said defendant of his bond for the payment of \$6,500 on or before three years from said date, with interest at the rate of 5% per annum, containing the usual clauses, and a purchase money mortgage of the aforesaid premises with the same condition as the said bond, and tendered to said defendant for execution a bond and mortgage in all respects in accordance with said agreement; but the said defendant then and there refused and ever since has refused to accept the said deed and to pay the said balance and to execute the said bond and mortgage according to the said agreement.

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WHEREFORE, Plaintiffs pray for judgment that said defendant perform said agreement and pay to the plaintiffs the said sum of \$2,500, with interest thereon from the said 15th day of April, 1907, and execute the said bond and mortgage and pay interest upon the principal thereof from the said 15th day of April, 1907, and that the plaintiffs have such other or further judgment in the premises as shall be proper and the costs of this action.

WM. ALLAIRE SHORTT,
Plaintiffs' Attorney.

[*Verification.*]

CLEMENT NATIONAL BANK, Plaintiff, v. BRAINARD AVERY,
Defendant

(City Court of the City of N. Y., September 16, 1913)

Bill of particulars; payment

1. While a bill of particulars may be required of a defense of payment a motion therefor should not be granted where the sole purpose of the application is to limit the defendant in his proof of payment.

Motion for bill of particulars.

Denied.

Frederick H. Britton, attorney for the plaintiff.

Jay E. Whiting, attorney for the defendant.

DELEHANTY, J.:

From a reading of the briefs submitted it is difficult to escape the conclusion that the sole purpose of this application is to limit defendant in his proof of payment.

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I have concluded therefore to deny the same on the authority of *Barone v. O'Leary*, 44 App. Div. 418; 60 Supp. 1131; *Swan v. Swan*, 44 Misc., 163; 89 Supp. 794. While under proper circumstances a bill of particulars of alleged payments may be required (*Coolidge v. Stoddard*, 120 App. Div. 641; 105 Supp. 544), such facts are not presented herein. Order signed.

ELLA L. HOWKINS, Plaintiff, v. WILLIAM HOWKINS et al,
Defendants

(Supreme Court, N. Y. Special Term, Part I, September 27, 1913).

**Dower; practice; necessity of entering interlocutory judgment in
any case**

1. While the Code provides two separate methods of procedure in an action for dower an interlocutory and a final judgment must be entered in each case under § 1619.

Action for dower.

Howard A. Sperry, attorney for the plaintiff.

Stroock & Stroock, attorneys for the defendants.

DELANY, J.:

The proposed judgment presented or the court's signature is in form a final judgment. The action is for dower, and is brought under the provisions of chapter 14, title 1, article 3, of the Code of Civil Procedure. An action for dower presents under the Code two separate methods of procedure, each providing for one interlocutory and one final judgment being appropriate to the end desired. At first glance it would seem that they are in conflict, but

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they are not. The statutes are so ordered that if the defendant defaults or does not dispute the plaintiff's right, or if the verdict, report or decision is in favor of the plaintiff's right to dower, an interlocutory judgment must be rendered directing that a referee or commissioners admeasure the plaintiff's dower (sec. 1607), and upon the confirmation of the report of the referee or the commissioners a final judgment must thereupon be rendered awarding plaintiff the distinct parcel of property admeasured and laid off by the referee or commissioners, or if it appear from their report that actual admeasurement is not practicable the final judgment must direct that a sum equal to one-third the rental value be paid the plaintiff for life, &c. (sec. 1613). If, however, before an interlocutory judgment is rendered the plaintiff file a written consent with the clerk to accept a gross sum in satisfaction of her dower (sec. 1617), and if the referee, &c., advise a sale of the property, an interlocutory judgment must be rendered directing it be sold (sec. 1619), and on confirmation of the sale a final judgment must be rendered directing the gross sum be paid to the plaintiff (sec. 1624). In the case before me the plaintiff has filed her consent to accept a gross sum in satisfaction of her dower. The referee has reported that a sale of the property is necessary. The parties to the action consent to the sale, and I have confirmed the report. The proposed judgment submitted is in form a final judgment, and provides for the appointment of a referee to sell, and directs him to pay all the parties' costs and fees and allowances of the guardians, &c. Section 1619, which provides that an interlocutory judgment directing sale must be rendered, has been overlooked by the parties in this case. By section 1625 it is provided that the provisions of the Code governing the distribution, investment and care of the proceeds of a sale in partition are made applicable to a sale in an action for dower. Present proper interlocutory decree for signature.

CHARLES W. CLOWE, as Trustee in Bankruptcy of ELIZABETH S. C. SEAVEY, Respondent, v. ELIZABETH S. C. SEAVEY et al., Appellants ¹

(208 N. Y. 496; aff'g 151 App. Div. 912; 135 Supp. 1105, no opinion)

Bankruptcy; fraudulent transfer of estate in expectancy when transferee did not participate in fraud

1. A bankrupt was named as a beneficiary under her grandfather's will by which she received a portion of his estate provided she survived her father and mother. She transferred this estate in expectancy to her mother-in-law in consideration of \$1,000 and an agreement on the part of the transferee to convey by will the estate transferred and other property to the bankrupt, her husband and their children. It was found that there was no fraudulent intent on the part of the transferee. *Held*, that the estate transferred was alienable; that a person cannot successfully put his property beyond the reach of his creditors by a transfer which secures it to himself and his children even though the transferee may have the best of motives and be ignorant of the fraudulent intent; that the estate passed to the trustee in bankruptcy and a judgment setting aside the transfer which provided for a repayment to the transferee of the \$1,000 advanced, with interest, should be affirmed.

Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered May 31, 1912, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

Henry J. Hemmens and *Thomas H. Beardsley* for appellants.

Edgar T. Brackett, *William E. Bennett* and *Hiram C. Todd* for respondent.

¹ For Complaint from this case, see *post*, page 377.

MILLER, J.:

This action is brought by a trustee in bankruptcy to set aside a transfer made by Elizabeth S. C. Seavey, the bankrupt, to her mother-in-law of all her right, title and interest, present and future, in and to the estate of her grandfather. She had no other property. The court found upon sufficient evidence that she made the transfer with intent to cheat and defraud creditors, and in effect that it was voluntary except for the sum of \$1,000 loaned by the transferee upon the security of it. The court also found that the transferee did not participate in said fraudulent intent. The judgment provides for the repayment of said loan with interest. The instrument of transfer was executed by both parties. The transferee expressly agreed that in consideration of the transfer she would devise and bequeath the estate transferred to her as well as all of her other estate in trust for the use of the transferor and her husband during their lives and the life of the survivor with remainder to their son. The particular clause of the will creating said interest reads as follows:

"In the event of the death of my said son, and the remarriage of his said wife, should she survive him, I desire and direct my said Trustees, John B. Clement and John Cox, to pay to my said grandchildren, lawful children of my son Henry S. Clement, or their descendants, all the estate hereby devised to my son, Henry S. Clement, and his children, as aforesaid. * * *"

It is of no consequence that the transferee had no intent to hinder, delay or defraud the creditors of the transferor. A person cannot successfully put his property beyond the reach of his creditors by a transfer which secures it to himself and his children, even though the transferee may have the best of motives and be ignorant of his fraudulent intent.

The important question in the case is whether the interest of the bankrupt passed to the trustee in bankruptcy.

Curiously enough the inalienability of that interest is asserted by those who claim under an assignment of it. It is forcibly urged by the learned counsel for the respondent that said interest is a vested remainder. However, we do not consider it necessary to determine whether it was vested or contingent, because we are of the opinion that in either view it was alienable.

It was decided in *National Park Bank of N. Y. v. Billings*, 144 App. Div. 536; 129 Supp. 846; 203 N. Y. 556, that future contingent interests in personal property were alienable, the same as contingent remainders in real property, but it is argued that that case is distinguishable in that in this case the persons who are to take cannot be ascertained until the death of the life beneficiary. The writer did observe in that case that there was no uncertainty of the person, and it has been stated by text writers and often assumed by judges that contingent interests are mere possibilities and not alienable where there is uncertainty of the persons who are to take. That doctrine had its origin in conditions which no longer exist. It did not survive the adoption of the Revised Statutes, which divided expectant estates into (1) future estates and (2) reversions, and provided that a future estate is contingent "while the person to whom or the event on which it is limited to take effect remains uncertain," and that "an expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession." [R. S. pt. 2, ch. 1, tit. 2, §§ 9, 13 and 35; now Real Prop. Law (Cons. Laws, ch. 50), §§ 36, 40 and 59.] Those provisions are plain and simple and leave no room for the refinements of the ancient common law.

Assuming the interest of Mrs. Seavey under her grandfather's will to be contingent it will be extinguished by her death before the death of her father. If the person to take were certain, and the event uncertain, the contingent interest or estate would never vest in possession, unless the event happened. The statute makes no dis-

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inction between uncertainty of person and uncertainty of event, and there is no sound reason to make such a distinction with respect to the alienability of contingent interests. Whatever the uncertainty, they are defined by the statute as estates. Of course, the contingency may be such that the interest or estate is not transmissible, descendible or devisable, but so far as the nature of the contingency admits, all expectant estates are descendible, devisable and alienable. The interest of Mrs. Seavey is certain to vest in possession and enjoyment if she survives the event, and there is no substantial difference between this case and *National Park Bank of N. Y. v. Billings* (*supra*). In that case, as in this, the interest was contingent upon survivorship, but in this case, as in that, it is not subject to the will of a third party, and is more than a mere possibility, *e. g.*, the chance of sharing as next of kin in the estate of another upon his death or "that which the heir has from the courtesy of his ancestor," or a mere possibility of reverter, which was involved in *Upington v. Corrigan*, 151 N. Y. 143.

We should not introduce subtleties into the plain rule of the statute, unless constrained to do so. It will not be profitable to discuss in detail the many cases cited by the appellants. Expressions may be found in judicial opinions which, apart from their context, may seem to support the distinction sought to be made between uncertainty of person and uncertainty of event, but it is sufficient to say that the precise point has already been decided by this court in favor of the respondent, and that the cases relied upon by the appellants did not deal with it.

Jackson v. Waldron, 13 Wend. 178, and *Edwards v. Varick*, 5 Denio, 664, are only of historical interest. They involved an assignment made in 1804. Their authority even as to the common law was much weakened, if indeed they were not overruled, in *Miller v. Emans*, 19 N. Y. 384. *Moore v. Littel*, 41 N. Y. 66, was the first authoritative decision on the effect of the Revised

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Statutes. It involved a grant made in 1832 to one John Jackson "for and during his natural life, and after his decease to his heirs and their assigns forever." The question was whether the children of John Jackson had an interest in the premises which they could convey during his life. Judge WOODRUFF was of the opinion, *first*, that the remainders were vested, and, *second*, that if contingent, they were alienable under the Revised Statutes, although the uncertainty was as to the persons. A majority of the court concurred on the latter ground, as was pointed out by Judge FINCH in *Hennessey v. Patterson*, 85 N. Y. 91, 104. While *Moore v. Littel* has sometimes been criticized, it has never been overruled, but has been cited many times as authority for the proposition that contingent estates are alienable. (*Ham v. Van Orden*, 84 N. Y. 257, 270; *Beardsley v. Hotchkiss*, 96 N. Y. 201, 213; *Dodge v. Stevens*, 105 N. Y. 585, 588; *Griffin v. Shepard*, 124 N. Y. 70, 76; *Matter of Pell*, 171 N. Y. 48, 54; *Roosa v. Harrington*, Id. 341, 353; *Baltes v. Union Trust Co. of N. Y.*, 180 N. Y. 183, 187.)

It seems strange that the question should still be thought open. It should be set at rest. We adhere to the ruling of *Moore v. Littel* not alone because it has been recognized as authority so long, but because that ruling gives effect to the plain language of the statute. I may add that the rule is the same in Massachusetts. (*Putnam v. Story*, 132 Mass. 205; *Whipple v. Fairchild*, 139 Mass. 262.)

The judgment should be affirmed, with costs.

CULLEN, Ch. J., WILLARD BARTLETT, CHASE, CUDDEBACK and HOGAN, JJ., concur; GRAY, J., not voting.

Judgment affirmed.

Complaint

Form No. 37

Complaint; Bankruptcy; Fraudulent Transfer of Estate in Expectancy when Transferee did not Participate in Fraud ¹

Supreme Court, Saratoga County.

Charles W. Clowe, as Trustee
in bankruptcy of Elizabeth
S. C. Seavey, a bankrupt,
against

Elizabeth S. C. Seavey, Mary
E. Seavey, James Arthur
Seavey, Arthur Clement
Seavey, Henry S. Clement,
Henry S. Clement, Jr., and
Elizabeth S. C. Seavey and
Henry S. Clement, Jr., as
trustees for Henry S. Cle-
ment under the will of Wil-
liam H. Clement, deceased.

The plaintiff, for an amended complaint herein, avers upon information and belief as follows: to wit:

FIRST: That heretofore, before the commencement of this action and on or about the 18th day of April, 1911, the defendant Elizabeth S. C. Seavey, who then resided in the Borough of Manhattan, in the County of New York, upon proceedings duly had, was duly adjudged a bankrupt by the District Court of the United States in and for the Southern District of New York, which court had jurisdiction in the premises; that thereafter such proceedings were had in the matter of said bankruptcy that on or about the 15th day of June, 1911, the plaintiff herein was duly named and appointed as the

¹ From *Clowe v. Seavey*, 208 N. Y. 496; aff'g 151 App. Div. 912; 135 Supp. 1105. See *ante*, page 372.

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trustee of said bankrupt in such proceedings and thereafter and before the commencement of this action he duly qualified as such trustee and did each and every act and thing necessary to be done in the premises to constitute him in all respects the legal trustee of said bankrupt and he was invested with all the rights and powers, and became subject to all the duties of such, among other rights, with that of marshalling and collecting all the property and assets of said bankrupt and any that have been fraudulently or illegally transferred by her, including the right to prosecute and maintain this action.

SECOND: That heretofore and in or about the month of January, 1887, William H. Clement, who was at the time of his death a resident and inhabitant of Warren County, State of Ohio, at said time departed this life leaving his last will and testament which bears date November 27, 1886. That thereafter, upon proceedings duly had in the Probate Court of Warren County in said State of Ohio, which court had jurisdiction in the premises, said will of said William H. Clement was duly admitted to probate and letters testamentary thereunder issued to the persons therein named as executors, and they, or some of them, entered upon the performance of their duties as such and said will was partially, if not completely executed. Said will was also duly admitted to probate by the Surrogate's Court at Saratoga County, New York, on the 11th day of March, 1889, and recorded in Book of Wills No. 31 at page 245 in said Surrogate's office.

THIRD: That the defendant Henry S. Clement was one of the sons and heirs-at-law of said William H. Clement and one of the devisees and legatees named in said will; that his wife was Julia Y. Clement by name and she departed this life in or about the month of January, 1911; that the defendant Elizabeth S. C. Seavey and Henry S. Clement, Jr., are the only children of the said Henry S. Clement, being grandchildren of said William H. Clement

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and children of the said Julia Y. Clement; that the defendant Arthur Clement Seavey is the only child of the defendant Elizabeth S. C. Seavey and her husband James Arthur Seavey; that the defendant Mary E. Seavey is the mother of the defendant, James Arthur Seavey, the mother-in-law of the defendant Elizabeth S. C. Seavey, and the grandmother of the defendant Arthur Clement Seavey.

FOURTH: That by said will of said William H. Clement, thus admitted to probate as aforesaid, a trust was created for the benefit of the defendant Henry S. Clement during his life, and for the benefit of his wife Julia Y. Clement and of their said only children, the defendants Elizabeth S. C. Seavey and Henry S. Clement, Jr., into which trust was devised and placed an undivided one-quarter of the residuum of the estate of said testator, which amounted to a large amount of money, and, as the plaintiff believes, as much as one hundred thousand dollars, or over; that John B. Clement and John Cox were named as trustees of said trust, and accepted the said trust and acted thereunder for a number of years, and until the said John Cox died; that by the terms of said trust, the income of said trust fund was to be applied to, and was given for, the support and maintenance of said son of said testator, the defendant Henry S. Clement and of his wife, said Julia Y. Clement, and after the death of said Henry S. Clement and Julia Y. Clement the principal of said fund was given to the children of said son Henry S. Clement and, as aforesaid, the defendants, Elizabeth S. C. Seavey and Henry S. Clement, Jr., are the only children of said son Henry S. Clement and, at the time of the probate of said will of said William H. Clement, said Elizabeth S. C. Seavey and Henry S. Clement, Jr., became vested with said amount thus placed in said trust fund by said will, subject only to any claims of after-born children, a contingency which never has occurred and to the execution of said trust.

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FIFTH: That said John B. Clement and John Cox having accepted said trust imposed upon them by said will and having discharged the duties thereof for a time, the said John Cox died and thereafter the said John B. Clement, in or about the year 1907, resigned as such trustee, which resignation was received and allowed by said Probate Court of Warren County, Ohio, which had jurisdiction in the premises, and thereafter and on or about the 14th day of May, 1907, the defendants Elizabeth S. C. Seavey and Henry S. Clement, Jr., were named and appointed by said court as the successors of said named trustees and the said Elizabeth S. C. Seavey and Henry S. Clement, Jr., accepted said appointment and duly qualified as such trustees and entered upon their duties as such, and ever since have been, and have continued to act as, and now are, such trustees and as such trustees have ever since said appointment, had the custody and control of the said trust and the funds and property thereof.

SIXTH: That as the plaintiff is informed and believes among other assets and property included in said trust and set off to it upon the division of the estate of said William H. Clement, deceased, was and is an undivided one-half interest in and to certain real estate situate in the Village of Saratoga Springs in said County of Saratoga and State of New York, briefly described as follows: Bounded westerly by Broadway; northerly by premises of the Saratoga Athenaeum; easterly by premises of Emily H. and Frank H. Hathorn, and southerly by premises formerly owned by Westcott and others, being Nos. 330, 332, 334, 336 and 338 Broadway in said village, which interest in said real estate thus described—the one-half interest of said Elizabeth S. C. Seavey in said undivided one-half of said real estate in said trust fund, is worth from eight to ten thousand dollars as the plaintiff believes.

SEVENTH: That as hereinbefore alleged, the defendant Elizabeth S. C. Seavey, upon the death of her said grandfather William H. Clement, and the probate of his will as

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hereinbefore set out, became vested with the undivided one-half part of the said trust funds thus created and to continue during the lifetime of the defendant Henry S. Clement and his wife Julia Y. Clement, subject only to the execution of said trust during the lives of said Henry S. Clement and Julia Y. Clement, and upon the death of said Julia Y. Clement in the month of January, 1911, as hereinbefore stated, said interest became and from that time forth has remained, subject only to the life interest of the said Henry S. Clement in said trust fund.

EIGHTH: That on or about the 19th day of November, 1908, the defendant Elizabeth S. C. Seavey was indebted upon her certain promissory note bearing date on or about October 26, 1908, made by herself and the defendant Henry S. Clement, Jr., for the sum of ten thousand dollars and payable one month after its date to the order of and endorsed by the defendant James Arthur Seavey, which said note was before maturity and for value received transferred to the Adirondack Trust Company, and was on said 19th day of November, 1908, owned and held by said Adirondack Trust Company and was a valid and subsisting obligation of said defendant Elizabeth S. C. Seavey; that on said last named date the defendant Elizabeth S. C. Seavey, being vested as aforesaid with said interest in said trust fund, created as aforesaid in and by said will of said William H. Clement, deceased, and with intent to cheat and defraud her creditor, the owner and holder of said note, and to hinder and delay such creditor in the collection of such debt, made and executed a certain paper with her mother-in-law, the defendant, Mary E. Seavey, of which paper a copy in full is hereto annexed marked "A," which is hereby referred to and made a part of this complaint; that said paper, as the plaintiff is informed and believes, was never delivered to said Mary E. Seavey and no title ever passed thereby or thereunder to said Mary E. Seavey; that said paper was and is void upon its face as to creditors of said Eliza-

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beth S. C. Seavey then existing or thereafter to arise, in that it stipulated and provided for a reversion to the grantor, the defendant Elizabeth S. C. Seavey, of the use of the fund covered by said assignment, or attempted to be covered thereby, from the time of the death of the defendant, Mary E. Seavey, and said conveyance, if ever delivered at all was and is void for such reasons, and was and is void for the additional and further reason that the same was executed by the said parties thereto with the intent and purpose on the part of each of said parties to cheat and defraud the holder of said note, the creditor then existing and still existing, of the defendant Elizabeth S. C. Seavey and to hinder and delay such creditor in the collection of its debt; and such paper was and is void for the further reason that the same was without sufficient or valid consideration therefor; nevertheless the parties to said instrument both claim, and each claims, that thereby the title of the said Elizabeth S. C. Seavey in and to said trust fund and the property comprising the same, passed to and became the property of the defendant, Mary E. Seavey, and that ever since the execution of said paper said last-named defendant has been the owner thereof.

NINTH: That the indebtedness of ten thousand dollars thus owing by the defendant Elizabeth S. C. Seavey at the time said instrument was executed, has never been paid, nor any part thereof, except that the interest thereon was paid to a time not later than the 28th day of December, 1910, and with said exception of the payment of said interest the entire amount of indebtedness of said note existing at the time of the execution of said paper Exhibit "A" has continued outstanding and unpaid and unimpaired and has been represented by notes given in successive renewal of said indebtedness from time to time, so that at the time of such adjudication of bankruptcy, as hereinbefore set out, there was in existence outstanding and unpaid, the same indebtedness of the said defendant,

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Elizabeth S. C. Seavey, although represented by another note than was outstanding and was in existence at the time of and before the execution of said paper, Exhibit "A," as hereinbefore set out. That said debt has been proved and filed in the bankruptcy proceedings of said Elizabeth S. C. Seavey and allowed by the referee in charge thereof; that the plaintiff has no money or other property in his possession to pay said debt or any part thereof, and the sole asset of said bankrupt's estate is the property which the plaintiff seeks to recover in this action.

TENTH: That the defendant, Mary E. Seavey, if the said paper was ever delivered to her at all, accepted and received the same with full knowledge of the said indebtedness owing as aforesaid by the said Elizabeth S. C. Seavey and to aid her, said Elizabeth S. C. Seavey, in the intent hereinbefore set out.

ELEVENTH: That as plaintiff is informed and believes the defendant Elizabeth S. C. Seavey, has no other assets or estate wherewith or wherefrom said indebtedness hereinbefore described thus existing at the time of the execution of said paper, Exhibit "A," and at the time of said adjudication of her bankruptcy, and still existing or any part thereof, can be paid or satisfied.

WHEREFORE, plaintiff demands judgment against the defendants:

FIRST: That said instrument thus made and executed by the defendants, Elizabeth S. C. Seavey and Mary E. Seavey, dated November 19th, 1908, a copy of which is annexed to the complaint, be set aside and vacated and declared null and void and of no effect, as void upon its face and as made with the intent on the part of both the parties thereto to cheat and defraud the creditors of the defendant, Elizabeth S. C. Seavey, and to hinder and delay them in the collection of their debts.

SECOND: That the property and assets attempted to be conveyed by said paper, Exhibit "A," dated November 19, 1908, be declared to belong to the plaintiff as the trustee

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in bankruptcy of said Elizabeth S. C. Seavey, a bankrupt, and subject to administration in said bankruptcy court as the property of said bankrupt.

THIRD: That the defendants, Mary E. Seavey and Arthur Clement Seavey, be adjudged to have no interest in said trust fund or any part thereof.

FOURTH: That the plaintiff have such other and further relief in the premises as may be just, besides costs.

HIRAM C. TODD, Plaintiff's Attorney,

[Verification.] Town Hall, Saratoga Springs, N. Y.

EXHIBIT "A"

THIS INDENTURE made on this 19th day of November, 1908, between Elizabeth S. C. Seavey, of the City, County and State of New York, party of the first part, and Mary E. Seavey, of Saratoga Springs, Saratoga County, New York, party of the second part, WITNESSETH,

That the party of the first part, in consideration of the covenants hereinafter contained to be performed by the party of the second part, and of all the advances in money heretofore made by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged, bargains, sells, grants, conveys, assigns, transfers and delivers and by these presents does bargain, sell, grant, convey, assign, transfer, and deliver all her right, title and interest of whatever nature in and to the estate of William H. Clement, late of Warren County, Ohio, deceased, of which she is possessed or seized, at the present time of which she may become possessed or seized in the future by virtue of the will of the said William H. Clement, deceased, dated the 24th day of November, 1886, and admitted to probate by the Probate Judge of Warren County, Ohio, and filed in the office of the Clerk of the Probate Court, Warren County, Ohio, and recorded in the office of the Surrogate of Saratoga County, New York.

And the party of the first part does hereby constitute

Complaint—Exhibit "A"

the said Mary E. Seavey, her attorney in her name or otherwise, but at her own cost, to take all legal measures which may be proper or necessary for the complete recovery and enjoyment of the said interest in said estate of said William H. Clement, deceased, as aforesaid.

And as a further consideration of the foregoing sale transfer, assignment and conveyance the party of the second part doth hereby, for herself, her executors, administrators and assigns, agree with the party of the first part that she will, upon the execution and delivery of this agreement, make, execute, publish and declare a last will and testament in which she will give, devise and bequeath at her death, all the said estate hereby conveyed to her, as well as all of her other estate, both real and personal, of whatever name and nature and wherever situated of which she may die seized or possessed in trust, for the sole use, benefit and support of her son James Arthur Seavey, of the City, County and State of New York, and his wife Elizabeth S. C. Seavey, of the City, County and State of New York, for and during the period of their natural lives and during the life of the survivor of the said James Arthur Seavey and said Elizabeth S. C. Seavey. and the remainder to their son Arthur Clement Seavey, of the City, County and State of New York.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year above written.

ELIZABETH S. C. SEAVEY (Seal).

MARY E. SEAVEY (Seal).

Sealed and delivered in presence of:

J. W. NEEDHAM,

CHAS. W. KIRBY,

As to Elizabeth S. C. Seavey.

J. W. NEEDHAM,

CHAS. W. KIRBY,

As to Mary E. Seavey.

(Acknowledgment, Elizabeth S. C. Seavey.)

(Acknowledgment, Mary E. Seavey.)

Opinion of the Court

RASHID MOGHABGHAB, as administrator of the goods, chattels and credits of SHAKIR MOGHABGHAB, deceased, Plaintiff, v. Sherman & Sons Company, Defendant.

(Supreme Court, N. Y. Special Term, Part I, September 12, 1913)

Pleading; complaint; demurrer; performance of written contract attached to complaint; pleading both due performance under Code Civ. Pro., § 533, and specifying acts constituting performance

1. When a written contract, on which an action is brought, is attached to a complaint and the plaintiff alleges acts constituting performance and also adds an allegation that the contract has been duly performed, under Code Civ. Pro., § 533, the allegation of due performance will be disregarded and the sufficiency of the complaint will be determined by the specific allegations showing performance of the contract.

Demurrer to complaint.

Sustained.

Ferris, Dannenberg & Ansbacher, attorneys for the plaintiff.

Henry G. Gennert, attorney for the defendant.

DONNELLY, J.:

The complaint is demurred to by the defendant for insufficiency, the particular defect claimed being that the specific allegations of performance in paragraphs seventh to tenth of the complaint are insufficient. The plaintiff, while pleading performance generally, pursuant to § 533 of the Code of Civil Procedure, failed to rely on the provisions of that section, and in addition thereto alleges the details of performance in the paragraphs above mentioned and is therefore bound by such details, and it thus becomes necessary to consider the sufficiency of the

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specific allegations of performance set forth in said paragraphs. *Corr v. Sun Printing & Publishing Co.*, 177 N. Y. 131. These allegations fail to show compliance with the terms of the agreement annexed to the complaint and made part of it in that it does not appear therefrom that the other stockholders sold and delivered their stock to the defendant under and pursuant to the terms of said contract, or that the plaintiff's intestate ever tendered or surrendered his shares of stock to the defendant duly assigned to Sherman & Sons, as in the agreement provided. The demurrer is sustained, with costs, with leave to the plaintiff to serve an amended complaint within twenty days upon payment of costs of action to date.

LUDWIG NISSEN & COMPANY, Plaintiff, v. ELIZABETH C. VATABLE, Defendant

(Supreme Court, N. Y. Special Term, Part I, September 23, 1913)

Supplemental pleading; motion for permission to serve amended and supplemental answer; construed as motion to serve supplemental answer only

1. As there is no such pleading provided by the Code of Civil Procedure as an amended *and* supplemental answer, and it appearing that the defendant should be permitted to serve a supplemental answer, it was held that a motion for permission to serve an amended and supplemental answer should be construed to be an application for permission to serve a supplemental answer only.

Motion for permission to serve an amended and supplemental answer.

Granted as to supplemental answer.

Beekman, Menken & Griscom, attorneys for the plaintiff.

Anderson, Iselin & Anderson for the defendant.

DELANY, J.:

The application is for permission to serve what is called a "supplemental" and "amended" answer. There is no such pleading provided by the Code. These words "supplemental" and "amended" occur in several places in the Code in just such position and therefore may perhaps be taken to express a title of a pleading so termed. They are, however, disjunctive. This motion seems to warrant the application for a supplemental answer and the motion is construed to be intended to apply for such. Motion granted, with costs to plaintiff.

WILLIAM H. CHILDS, Appellant, v. H. KIRKE WHITE,
Respondent.¹

(158 App. Div. 1; 142 Supp. 732)

Corporations; directors; man of good business standing becoming director to facilitate sale of preferred stock when corporation is in bad financial condition; action by purchaser of stock against director for negligence

1. Under a complaint in which it was alleged that the defendant, knowing a corporation to be insolvent at its inception, became a director to facilitate the sale of the company's preferred stock, by giving to the company the benefit of his name and his reputation for wealth and business success, and that the defendant was negligent in the performance of his duties as director and permitted another to manage all of the company's affairs, including the sale of said stock, which sale was accomplished by false circulars, false reports to one or more commercial agencies, the payment of unearned dividends, false oral statements made by such representatives and

¹ For Complaint from this case see *post*, page 394. See the case of *Van Slochem v. Villard*, *ante*, page 98, and notes thereto referring to a number of other complaints in actions for fraud inducing the purchase of stock of a corporation. See also *Ottinger v. Bennett*, *post*, page 432, and *Rives v. Bartlett*, *post*, page 443.

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by other deceitful means, of some of which acts the defendant had actual knowledge and as to others he had notice of facts which should have put him on inquiry, and that had the defendant conducted himself with reasonable prudence and had he not practically abdicated all of such duties as director and failed to perform the same he would have known the circumstances under which the stock was being sold and the plaintiff would not have been led into the investment and lost his money, it was held that the evidence given upon the trial, so far sustained the cause of action stated in the complaint that it was error on the part of the trial court to dismiss the same and that a new trial should be ordered.

2. The directors of corporations owe a certain measure of duty, not only to existing stockholders, but also to those from whom the corporation may solicit subscriptions for its stock or securities, and they are bound to use such degree of both diligence and care in the performance of such duties as properly pertain to their office, and they are liable for negligence in failing to do so.

Appeal by the plaintiff, William H. Childs, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 14th day of February, 1913, upon the verdict of a jury rendered by direction of the court after a trial at the New York Trial Term.

Phillips & Avery (Edgar J. Phillips, Frank M. Avery and Earl A. Darr of counsel) for the appellant.

Nicoll, Anable, Lindsay & Fuller (John D. Lindsay of counsel) for the respondent.

HOTCHKISS, J.:

In October, 1910, plaintiff purchased from the domestic business corporation of White, Van Glahn & Co. \$50,000 of its preferred stock at par. In May, 1911, the company was adjudged a bankrupt. By this action plaintiff seeks to recover his loss from defendant, whom he alleges was continuously a director of the company from its organiza-

tion in December, 1908, until its failure. In brief, the negligence alleged in the complaint, evidence tending to prove which was given in plaintiff's behalf at the trial, was, that defendant, knowing the company to be insolvent at its inception, became a director to facilitate the sale of the company's preferred stock, by giving to the company the benefit of his name and his reputation for wealth and business success; that defendant was negligent in the performance of his duties as director, and permitted one Van Glahn to manage all of the company's affairs, including the sale of said stock, which sale was accomplished by false circulars, false reports to one or more commercial agencies, the payment of unearned dividends (see *Ottinger v. Bennett*, 203 N. Y. 554, reversing S. C. on opinion of MILLER, J., 144 App. Div. 525; 129 Supp. 819), false oral statements made by Van Glahn personally, and by other deceitful means, of some of which acts defendant had actual knowledge, as to others he had notice of facts which should have put him on inquiry, and that as to all, if defendant had conducted himself with reasonable prudence and had he not practically abdicated all and failed to perform any of his duties as director, he would have known the circumstances under which the stock was being sold, and plaintiff would not have been led into the investment and loss of his money.

The respondent argues that such an action will not lie; that there is no "privity" between the plaintiff, a stockholder, and defendant, a director. Of privity in a strict sense, of course there is none. Nor is any necessary. But two elements are ordinarily necessary to sustain an action for negligence—a violation of duty owing by one to another or to the public, followed by such an injury as is the natural consequence of the negligent act, or which might reasonably have been anticipated to result therefrom. (Per ANDREWS, Ch. J., *Knox v. Eden Musee Co.*, 148 N. Y. 441, 461, 462.) That directors of corporations owe a certain measure of duty not only to existing stock-

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holders, but as well to those from whom the corporation may solicit subscriptions for its stock or securities, and that they are in that behalf bound to use some degree of both diligence and care in the performance of such duties as properly pertain to their office, and are liable for negligence in failing so to do, is a proposition too well established to be now open to dispute. What is due diligence and care varies with the circumstances of each case, and it is impossible to formulate precisely general rules which will cover all states of fact. But that directors are bound to use a reasonable degree of care in the performance of these acts, which, under the circumstances, prudence would fairly seem to require them to perform, is, in the light of the authorities, a lenient statement of the rule of law affecting this subject. (See *Campbell v. Watson*, 62 N. J. Eq. 396, 426 *et seq.*)

The classes of actions in which the duties of directors have been defined have commonly been those based upon deceit, or breach of trust. Some have arisen upon rights of action originally accruing to the corporation but which have been prosecuted in its behalf by stockholders or by receivers; others have been actions brought by stockholders or creditors directly to their own use. But the circumstances under which the action must be pursued in the right of the corporation and those under which it may be brought for the use of the individual plaintiff (see *Niles v. N. Y. C. & H. R. R. Co.*, 176 N. Y. 119, 123, 124) suggest no distinction so far as the duties of a director are concerned.

While the legal relation which directors occupy toward the foregoing several classes of plaintiffs may not be identical (*Briggs v. Spaulding*, 141 U. S. 132, 148; *Dykman v. Keeney*, 154 N. Y. 483, 491), and although the measure of service and attention owing by directors is not the same in all kinds of corporations, there is to be found in many of the reported cases language which upon principle is clearly applicable to an action for negligence against

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one in the situation of this defendant. Thus, in *Hun v. Cary*, 82 N. Y. 65, it was said (p. 71): "When one deposits money in a savings bank, or *takes stock in a corporation*, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him *such* a degree of care and prudence, and it is a gross breach of duty—*crassa negligentia*—not to bestow them." In *McChure v. Wilson*, 70 App. Div. 149, 153; 75 Supp. 212, in which a receiver of a co-operative life insurance company sought to recover from a director moneys received to the use of the corporation, we said: "As a director he was chargeable with such knowledge as he gained in that capacity or might have learned by the exercise of reasonable care. He could not blindly shut his eyes to what was transpiring about him and shelter himself behind the claim that he was merely acting in the interest of a friend and knew nothing of what he was doing." Upon abundant authority, in *People v. Equitable Life Assurance Society*, 124 App. Div. 714, 731; 109 Supp. 453, the same principle of imputed knowledge and responsibility for nonfeasance and acts suffered to be done because of inattention and lack of care, was applied by this court in a statutory action against directors for loss occurring through neglect of duty. The recent case of *Rives v. Bartlett*, 156 App. Div. 552; 141 Supp. 561, was an action of deceit against directors for inducing plaintiff to purchase stock of their corporation. If the views there expressed with respect to the duty and responsibility of directors are applicable in an action of deceit, they certainly apply to the present

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case. In short, the books are full of cases defining and applying the obligations under which directors of various classes of corporations rest, including their obligations to prospective as well as existing stockholders and prescribing rules of conduct which it cannot be doubted were violated by this respondent, if he were guilty of all or some of the acts alleged, and to which the evidence of the appellant was directed.

In view of the fact that there must be a new trial we refrain from commenting upon the force or effect of the evidence offered at the trial, further than to say that we think it was such as entitled plaintiff to have the questions of fact submitted to the jury and that the direction of a verdict in defendant's favor was error.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

INGRAHAM, P. J., LAUGHLIN and SCOTT, JJ., concurred;
DOWLING, J., dissented.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order to be settled on notice.

Complaint

Form No. 38

Complaint; Corporations; Directors; Man of Good Business Standing Becoming Director to Facilitate Sale of Preferred Stock when Corporation is in Bad Financial Condition; Action by Purchaser of Stock against Director for Negligence ¹

New York Supreme Court, New York County.

William H. Childs,
Plaintiff,

against

Henry Kirk White, said name "Henry" being fictitious, the true Christian name of this defendant being unknown to plaintiff, said defendant being commonly known by the name of H. Kirk White, residing at the City of Detroit, in the State of Michigan, and now or lately an officer of the corporation of D. M. Ferry & Co., seedsmen, of Detroit, Michigan,

Defendant.

County
Clerk's Index
Number,
19,332,
Year 1911.

The amended complaint of the plaintiff above named, by Phillips & Avery, his attorneys, respectfully shows to this court:

I. Upon information and belief, that at all the times

¹ From *Childs v. White*, 158 App. Div. 1; 142 Supp. 732. See *ante*, page 388.

For Complaint in action for fraud against promoters of a corporation acting through a common agent, by a person who has purchased stock, from *Downey v. Finucane*, 205 N. Y. 251, see 2 Bradbury's Pl. & Pr. Rep. 389.

For Complaint in equity action by a stockholder of a corporation

Complaint

hereinafter mentioned subsequent to December 4th, 1908, White, Van Glahn & Co. was and still is a domestic corporation, having its principal office and place of business in the Borough of Manhattan, City, County and State of New York.

II. Upon information and belief, that the certificate of incorporation of said White, Van Glahn & Co. was filed in the office of the Secretary of the State of New York on or about the 3d day of December, 1908, and that a duplicate original thereof was filed in the office of the Clerk of the County of New York on or about the 4th day of December, 1908.

III. Upon information and belief, that the eighth paragraph of said certificate of incorporation and of said duplicate original thereof, so filed as aforesaid, is as follows:

"Eighth: The names and post office addresses of the directors for the first year are as follows:

NAMES	POST OFFICE ADDRESSES
1. H. Kirk White.	Detroit, Michigan,
2. Edward C. Van Glahn	37 Barclay Street, Borough of Manhattan, New York City, New York.
3. A. D. Haulenbeek.....	Walton, New York.
4. Otto C. Schiffmann.....	69 Norwood Avenue, Borough of Brooklyn, New York City, New York.
5. Louis M. French.	Noroton Heights, Con- necticut.

in behalf of the corporation, and for the benefit of himself and all other stockholders, for an accounting from certain stockholders and to compel the return of stocks and bonds alleged to have been fraudulently transferred to certain directors, from *Consolidated Securities Co. v. Belmont*, 206 N. Y. 7, see 2 Bradbury's Pl. & Pr. Rep. 589.

For Complaint by stockholder against directors for improper issue

Complaint

IV. Upon information and belief, that the defendant herein is the H. Kirk White mentioned in said certificate of incorporation, and that said defendant became, at or about the date of the filing of said certificates, as aforesaid, a director of said corporation White, Van Glahn & Co., and that said defendant continued to be and was continuously a director of said corporation up to on or about the 24th day of April, 1911, and until said date held himself out to be such director, and permitted himself to be held out as such director.

V. Upon information and belief, that the defendant herein, at or about the time of the filing of said certificate, became and now is the owner and holder, on the books of said corporation White, Van Glahn & Co., of five hundred shares of the preferred capital stock of said corporation, and that said defendant, as such stockholder, has from time to time received, accepted and retained dividends, declared by the Board of Directors of said corporation, at meetings of said Board duly called, upon said stock so as aforesaid held by him; and that the defendant herein had due notice of such meetings; and that defendant from time to time by proxy voted upon said stock at stockholders' meetings of said corporation; and that said defendant has also received, accepted and retained a dividend on his said stock since the dates of the purchase by plaintiff of the stock in said corporation hereinafter mentioned.

VI. Upon information and belief that the defendant herein, being a director of said corporation, as aforesaid, was charged with the duties of said position and with the trust reposed in him; and that said defendant failed to perform his duties as such director and was negligent and careless therein and in the discharge thereof, and negligently and carelessly failed and refused to perform

of stock to directors when wrongful acts were consummated before the plaintiff acquired his stock, from *Pollitz v. Gould*, 202 N. Y. 11, see 1 *Bradbury's Pl. & Pr. Rep.* 300.

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his duties as such, and failed to attend the meetings of the Board of Directors of said corporation, and that defendant did not supervise or in any manner participate in the financial or business policy or affairs of said corporation; but on the contrary, the defendant wholly abandoned his duties as such director, and allowed one Edward C. Van Glahn to dominate and control the Board of Directors of said corporation and the remaining directors thereof, and to manage the affairs of said corporation almost exclusively; and further permitted said Van Glahn to act for the defendant herein in his place and stead; and allowed salaries to be paid to officers of said corporation without any proper resolution authorizing their payment; and allowed dividends to be declared and paid from moneys of said corporation other than from surplus or net profits arising from the business of said corporation; and allowed to be paid to stockholders and officers part of the capital of said corporation, by permitting dividends and salaries to be paid when same had not been earned or authorized; and that the declaration of such dividends and the withdrawal of such capital by the payment of dividends appear on the record or minutes of the proceedings of the Board of Directors of said corporation White, Van Glahn & Co.; and that the defendant continued to be a director of said corporation for more than six months after the declaration of such dividends and the withdrawal of such capital, and that said defendant did not cause nor in writing require his dissent therefrom to be entered on such records or minutes; and that said defendant, as such director, negligently allowed and permitted the false and fraudulent statements and representations herein-after mentioned to be made, given and published.

VII. Upon information and belief, that the said Edward C. Van Glahn, as an officer, to wit, as President and Manager of said corporation of White, Van Glahn & Co., falsely and fraudulently and with intent to deceive, made and caused to be made certain statements and

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financial reports of said corporation purporting to state and set forth its affairs, assets and liabilities and gave and caused the same to be made and given to the public for the purpose of inducing, stimulating and gaining credit in favor of said corporation, and also falsely and fraudulently and with intent to deceive, made and gave and caused to be made and given certain statements to R. G. Dun & Co. and to The Bradstreet Company, each of which was and is a corporation and mercantile agency of reliability and national reputation and engaged in the business of furnishing ratings, reports and statements to business houses and to the public in respect of the business and financial standing of merchants, corporations and others, on which to base credit and business transactions, and which said ratings and statements are, by well-established custom, accepted by merchants, dealers, prospective purchasers of stock and the public generally as a reliable source of information, and which said statements were made and given and caused to be made and given by said Van Glahn to said mercantile agencies with the intent and for the purpose that the same should be communicated by said agencies to merchants, dealers and prospective purchasers of stock in said corporation of White, Van Glahn & Co., and be published generally with the intent and purpose that the same should be relied upon by such merchants and dealers in dealing with said corporation of White, Van Glahn & Co., and by prospective purchasers of stock in purchasing the capital stock thereof and by whomsoever should receive such information and with the further intent and purpose that said mercantile agencies should also base their financial ratings of said corporation upon said statements and upon the alleged facts contained therein and which said ratings should also be communicated to merchants, dealers, prospective purchasers of stock and to the public.

VIII. That said statements and financial reports so as aforesaid made and given to the public, and said state-

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ments so as aforesaid made and given to said mercantile agencies, were false and untrue in that it was stated and represented thereby, among other things, and said Edward C. Van Glahn and said corporation of White, Van Glahn & Co., represented and stated thereby, among other things, that said corporation on the 31st day of January, 1910, had merchandise or stock on hand of \$257,726.30; that on the same date it had cash and accounts receivable of \$165,752.88; that the liability of the corporation on the same date for bills and accounts payable was \$224,827.69; and further represented and stated thereby, among other things, that said corporation on the 30th day of September, 1910, had merchandise or stock on hand of not less than \$260,000; that on the same date it had cash and accounts receivable of \$175,692.85; that the liability of the corporation on the same date for the bills and accounts payable was \$174,019.88; that by the statements and reports aforesaid it was stated and represented, among other things, that said White, Van Glahn & Co., was in a flourishing condition; that said corporation was conducting and had conducted for a considerable time prior to the giving and making of said reports a highly profitable business; that said corporation had made and was then making large net profits; that said corporation had assets worth many thousands of dollars over and above all its debts and liabilities; that its cash capital paid in was \$319,430 on said 31st day of January, 1910, and that its cash capital paid in was \$369,430 on said 30th day of September, 1910; that said corporation had paid to its stockholders from its surplus or net profits every year since its incorporation a dividend of seven per centum per annum on its capital stock and that said corporation had earned more than seven per centum per annum on its capital stock during such time.

IX. That as plaintiff is informed and believes, said representations and statements were false and untrue and same were known to be false and untrue to Edward C. Van

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Glahn and said corporation of White, Van Glahn & Co. at the time same were made and communicated as aforesaid to and by said mercantile agencies, in that said corporation did not on said 31st day of January, 1910, have on hand merchandise or stock of a value of \$257,726.30, but that on said date the stock and merchandise on hand of said corporation was of a value of many thousands of dollars less than said sum; in that it did not on said date have on hand cash and accounts receivable of \$165,752.88, but that on said date the cash and accounts receivable on hand of said corporation was of a value of many thousands of dollars less than said sum; in that bills and accounts payable of said corporation on said date were of a much greater sum than \$224,827.69; and in that said corporation, as plaintiff is informed and verily believes, did not on said 30th day of September, 1910, have on hand merchandise or stock of a value of not less than \$260,000 but that on said date the stock and merchandise on hand of said corporation was of a value of many thousands of dollars less than said sum; in that it did not on said date have on hand cash and accounts receivable of \$175,692.85 but that on said date the cash and accounts receivable on hand of said corporation was of a value of many thousands of dollars less than said sum; in that bills and accounts payable of said corporation on said date were of a much greater sum than \$174,019.88; in that said corporation was not in a flourishing condition but on the contrary was insolvent; in that said corporation was not conducting and had not for a considerable time prior to the making and giving of said reports been conducting a highly profitable business, but on the contrary was conducting and for a long time had been conducting business at a loss; in that said corporation had not made and was not then, making large net profits or any net profits at all; in that said corporation did not have assets worth many thousands of dollars over and above all its debts and liabilities but on the contrary

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the debts and liabilities of said corporation, then and for some time prior thereto, far exceeded in amount the value of all its assets; in that the cash capital of said corporation paid in was not \$319,430 on said 31st day of January, 1910, or anywhere near said sum; in that the cash capital of said corporation paid in was not \$369,430 on said 30th day of September, 1910, or anywhere near said sum; in that said corporation had not paid from its surplus or net profits every year since its incorporation or at any time, dividends of seven per centum on its capital stock, but on the contrary had paid dividends out of its capital and not from its surplus or net profits; in that said corporation had never earned more than seven per centum dividends on its capital stock; in that the merchandise on hand and the accounts receivable were grossly overstated; in that various amounts in such statements as liabilities were falsely set forth so as to show assets and equity which did not exist.

X. Upon information and belief, that such statements, so as aforesaid made and caused to be made to said mercantile agencies, caused and induced said R. G. Dun & Co. and The Bradstreet Company to give said White, Van Glahn & Co. a false, fictitious and fraudulent rating on their books, publications and records and to render, communicate and deliver false and untrue statements and reports to business houses, prospective purchasers of stock and to the public.

XI. That in addition to the statements furnished to said mercantile agencies, as aforesaid, the said corporation White, Van Glahn & Co., acting by and through said Edward C. Van Glahn, who was, as aforesaid, permitted and allowed by defendant to manage the affairs of said corporation, made, submitted and exhibited to this plaintiff, personally, certain other financial and business statements of said corporation purporting to set forth the affairs and conditions and financial standing of said corporation; and circulated and caused to be circulated

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certain printed circulars in the name of the corporation and delivered and caused to be delivered certain of same to plaintiff, which said circulars contained a statement of certain alleged business done and certain alleged profits claimed to have been made and earned by said corporation, each of which circulars, as plaintiff is informed and believes, contained and bore the name of said defendant H. Kirk White, and designated him as a director of said corporation White, Van Glahn & Co. and in certain cases stated the business of said defendant, and his social and business standing; and that, as plaintiff is informed and believes, the name of said defendant was placed on or signed to said circulars under and pursuant to permission and authority given by defendant to said Edward C. Van Glahn and to said corporation of White, Van Glahn & Co.; and that the name of said defendant H. Kirk White was placed upon said circulars, as plaintiff is informed and believes, for the purpose of inducing persons, and among others this plaintiff, to rely upon the statements therein contained in respect of defendant, and to purchase stock in said corporation of said White, Van Glahn & Co., in reliance thereon; and that, as plaintiff is informed and believes, said purpose was known to and was assented to by the defendant in this action.

XII. Upon information and belief, that the business of White, Van Glahn & Co. for many years and until the incorporation of said White, Van Glahn & Co., the corporation hereinbefore mentioned, had been conducted by a co-partnership firm under the name and style of White, Van Glahn & Co., and that said corporation of White, Van Glahn & Co. was the corporation of said co-partnership business.

XIII. Upon information and belief that said circulars hereinbefore mentioned contained among other things the following statements, to wit, that the business of White, Van Glahn & Co. (so as aforesaid conducted by the co-partnership firm of said White, Van Glahn & Co.,

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and then by said corporation of White, Van Glahn & Co.) had for many years earned much more in net profits than the amount of the annual dividends to which the preferred stock of said corporation of White, Van Glahn & Co., was and would be entitled, to wit, that said business had earned each year for many years previous to the issuance of said circulars as net profits much more than seven per centum upon the sum of \$150,000; that the said business of said White, Van Glahn & Co. so as aforesaid conducted by said co-partnership and then by said corporation, was and for many years had been very prosperous; and that the sales of said business during the years 1907 and 1908 had increased over thirty per cent in amount as compared with the sales of the same business for the year 1906.

XIV. That, as plaintiff is informed and believes said circulars and the statements and representations therein contained were false and untrue in that the said business of White, Van Glahn & Co., had not for many years or in any year earned annually more in net profits than the amount of annual dividends to which the preferred stock of said corporation of White, Van Glahn & Co. was and would be entitled, viz:—that said business had not earned each year for many years or in any year as net profits more than seven per centum upon the sum of \$150,000; that said business, in truth and in fact, had not in any year for many years earned any net profits whatever; in that said corporation had not in any year earned any dividends at all upon said preferred stock; in that the business of said corporation was not prosperous; that on the contrary, as plaintiff is informed and believes, the business of the firm was and for a long time had been run at a loss and in that, as plaintiff is informed and believes, the sales of said corporation during the years 1907 and 1908 had not increased over thirty per cent as compared with the sales of the same business for the year 1906; and that among others, certain of said statements delivered

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to plaintiff personally contained the same representations among others as those set forth in paragraphs "VIII" and "IX" herein and were false in the same particulars as therein set forth, as well as in others, and that in addition to the above-mentioned statements said Edward C. Van Glahn, prior to the purchase by the plaintiff of the stock herein mentioned, orally stated to this plaintiff that said corporation of White, Van Glahn & Co. was then, and for a long time prior thereto, had been making large net profits and paying dividends at the rate of seven per cent per annum on the capital stock of said corporation and was then earning and for a long time prior to said date had been earning a sum applicable to dividends of more than said seven per cent.

XV. Upon information and belief, that the said statements, and each of same, and said circulars, reports and each of same in the respects in this complaint mentioned, were false and untrue and that each of same were made and caused to be made with intent to deceive the plaintiff and other intending purchasers, and to induce them, and particularly this plaintiff, to rely thereon and to purchase stock in said corporation of White, Van Glahn & Co. and to induce this plaintiff to purchase five hundred shares of the preferred capital stock of said Company and to part with and pay over to said Company the sum of \$50,000 therefor, and that said statements, representations, circulars and reports, and each of same, were made, communicated and delivered to the plaintiff within two years prior to the time of the purchasing of the capital stock of the said corporation by this plaintiff, as hereinafter mentioned, and that said statements and representations hereinbefore set forth, were, and each of them was, false and untrue and were known by said corporation and by said Edward C. Van Glahn, as President and Manager thereof, to be false and untrue at the time same were made as aforesaid; that said Van Glahn as such President and Manager, prior to the purchase by the plaintiff of the stock herein men-

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tioned, entered upon a general scheme of fraud and misrepresentation for the purpose of stimulating and gaining credit in favor of said corporation of White, Van Glahn & Co., which scheme was long continued; and plaintiff further alleges that if defendant had exercised such reasonable care and diligence as should have been exercised by a Director of a corporation and by him as Director of the corporation of White, Van Glahn & Co., he could, would and should have known of the making of said statements and reports and the issuing and circulation of such of said circulars as were not actually known to him and each of same, and could, would and should have known the contents thereof, and could, would and should have known the same and each of same to be false and untrue and could and should have prevented the making and issuing of the same and could and should have recalled and corrected same and the agency rating of said corporation, and could and should have registered and filed with the said corporation, White, Van Glahn & Co., his dissent from the declaration of said dividends, and required such dissent to be entered on the records or minutes of the proceedings of the Board of Directors of said corporation of White, Van Glahn & Co., and could and would have known of said fraud and misrepresentations and scheme and could and would have known that said Edward C. Van Glahn was unfit to be President and General Manager of said corporation of White, Van Glahn & Co. and could and should have taken steps to prevent a continuation of such fraud and misrepresentation, all of which he failed to, and that this defendant was and is a man of large wealth and wide reputation as a successful business man and that he negligently permitted said Van Glahn and said corporation, under color and by weight of his name as a director, to accomplish the acts and results herein set forth.

XVI. That this plaintiff believed the statements, representations, reports and circulars herein mentioned to be true in all respects, and that by reason thereof and because

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of the declaration of said dividends and because defendant did not cause or in writing require his dissent therefrom to be entered and failed so to do, as hereinbefore alleged, and because of the failure and of the negligence of the defendant in the permission and because defendant was and had held himself out to be a director and had permitted himself to be held out to be a director of said corporation, and in reliance thereon and induced thereby, this plaintiff in the year 1910 and prior to the 8th day of October, purchased from and received from said White, Van Glahn & Co. five hundred certain shares of the capital stock of said corporation and delivered and paid over to said corporation in payment therefor the sum of fifty thousand dollars and that this plaintiff was in all respects free from contributory negligence.

XVII. Upon information and belief, that the said corporation White, Van Glahn & Co. is wholly insolvent, and that said corporation was wholly insolvent at the time said representations were made to this plaintiff and at the time said reports were made to said agencies as aforesaid, and at the time of the purchase of the stock by plaintiff, as aforesaid; and that certain of its creditors on or about the 2nd day of May, 1911, filed an involuntary petition in bankruptcy against said corporation, in the office of the Clerk of the United States District Court in and for the Southern District of New York, and that a Receiver of the property of said corporation was on or about said date duly appointed by said Court, and has duly qualified and taken charge of the assets and affairs of said corporation, and is still in possession thereof.

XVIII. That prior to the filing of the above-mentioned petition in bankruptcy and immediately after the discovery of the fraud and other matters and facts hereinbefore set forth, this plaintiff duly rescinded the purchase of said stock and tendered back to said corporation the stock which he had received, as aforesaid, and at the same time and place duly tendered back to said corporation,

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in cash, all dividends which he had received upon said stock, with interest upon said dividends from the date of the receipt thereof by plaintiff, and thereupon plaintiff demanded that such corporation return and repay to him said \$50,000, which he had been induced to part with and to pay over as herein mentioned, and that said demand was refused; and plaintiff, for the purpose of keeping said tender good, hereby offers to repay to said White, Van Glahn & Co. any and all dividends received upon said stock, with interest from the date of payment thereof, and to return said stock to said corporation; and that plaintiff will, upon the trial of this action, tender to said White, Van Glahn & Co. all stock and dividends which plaintiff has received from said corporation, with interest.

XIX. Upon information and belief that the stock of said corporation, both the preferred and the common, is wholly worthless and without any value whatever; that the liabilities of said corporation far exceed the value of all its assets and any sum that can be realized therefrom; that the assets and effects of said corporation will not be sufficient to pay more than a small dividend upon the valid claims of creditors against said corporation; and that there cannot and will not be any portion of the purchase price of stock, or any sum whatever, repaid or paid to the stockholders of said corporation or any division or distribution of assets whatever made among such stockholders, whether holders of preferred or common stock, after the creditors of said corporation are paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of fifty thousand dollars (\$50,000) with interest on twenty-five thousand dollars (\$25,000) thereof from September 30th, 1910, and with interest on twenty-five thousand (\$25,000) dollars thereof from October 5th, 1910, together with the costs and disbursements of this action.

PHILLIPS & AVERY, Attorneys for Plaintiff,

41 Park Row, Borough of Manhattan,

[Verification.]

New York City.

ABRAHAM FEINBLATT, Plaintiff, *v.* ISRAEL UNTERBERG,
WILLIAM SLUTSKI and ISRAEL BUTLER, Defendants¹

(City Court of the City of N. Y., October 21, 1913)

Costs; action on contract for unliquidated damages; costs to plaintiff before notice of trial; additional defendants who voluntarily appear without service of summons

1. In an action on a contract, when the damages are unliquidated, the plaintiff is entitled to costs in the sum of \$25 before notice of trial, under Code Civ. Pro., § 3251, subd. 1, and § 420.²

¹ Affirmed by the Appellate Term, First Dept., in April, 1914.

² Section 3251, subd. 1 of the Code of Civil Procedure provides that costs may be awarded to a plaintiff in the action: "For all proceedings, before notice of trial, in an action specified in section 420 of this act, fifteen dollars; in every other action, twenty-five dollars."

Section 420 of the Code provides as follows:

"Judgment may be taken without application to the court, where the complaint sets forth one or more causes of action, each consisting of the breach of an express contract to pay, absolutely or upon a contingency, a sum or sums of money, fixed by the terms of the contract, or capable of being ascertained therefrom, by computation only; or an express or implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to, or for the use of, the defendant or a third person; and thereupon demands judgment for a sum of money only. This section includes a case, where the breach of the contract, set forth in the complaint, is only partial; or where the complaint shows that the amount of the plaintiff's demand has been reduced by payment, counterclaim, or other credit."

It has been held that the test whether the plaintiff was entitled to costs before notice of trial amounting to fifteen dollars or twenty-five dollars depended upon whether or not the action was on contract or in tort. *Lange v. Schile*, 111 App. Div. 613; 98 Supp. 81.

It is held, however, that where the damages are liquidated judgment may be entered without application to the court under § 420 of the Code of Civil Procedure, even though the action is in tort for conversion, and the judgment entered thereon carried with it the right to issue an execution against the person. *Steamship Richmond Hill Co. v.*

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2. The sum of \$2 as costs for each additional defendant served not exceeding ten, under Code Civ. Pro., § 3251, subd. 1, is properly taxed in favor of the plaintiff when such defendants appear in the action, although they were not served with the summons, as this sum is allowed as costs and not as a disbursement.

Motion for retaxation of costs.

Denied.

Henry Kuntz, attorney for the plaintiff.

Louis B. Williams, attorney for the defendant.

DELEHANTY, J.:

The clerk properly taxed the item of \$25 as costs before notice of trial in view of the fact that the action was for breach of contract, the damages being unliquidated. Likewise was the item of \$4 for additional defendants served properly taxed, not as a disbursement, but as costs allowed, as the additional defendants, although not served, appeared in the action. Retaxation denied. Order filed.

Seager, 31 App. Div. 288; 52 Supp. 985. Appeal dismissed, 159 N. Y. 574; reargument denied, 160 N. Y. 312.

It would seem from the decisions in the text, together with the cases cited above, that even though the action was in tort, if the damages were liquidated the plaintiff would be entitled to only fifteen dollars. It also appears that if the damages are not liquidated that the plaintiff is entitled to twenty-five dollars costs before notice of trial, whether the action is for tort or in contract.

ELIZABETH M. NICHOLSON, as Administratrix of the
Estate of WILLIAM S. NICHOLSON, Deceased, Appellant,
v. THE TOWN OF STILLWATER, Respondent.¹

(208 N. Y. 203; rev'g 150 App. Div. 896; 134 Supp. 1140, no opinion)

Highways; municipal corporation; negligence; overturn of a motor car while turning out in the dark to make room for passage of horse and wagon, alleged to have been caused by narrow and unguarded highway

1. The plaintiff's intestate was driving a motor car along a much traveled road in the nighttime. He met a horse and

¹ For Complaint from this case, see *post*, page 415. For Notice of Claim served on defendant Municipal corporation, see *post*, page 423.

This action was tried four times before it reached the Court of Appeals and was sent back for a fifth trial. The first trial was held before Mr. Justice FRIIS and a jury at the Albany County Trial Term on May 24th, 1909, and resulted in a disagreement of the jury. The second trial was held before the same justice and a jury at the Albany County Trial Term, on September 27th, 1909, and resulted in a verdict in favor of the plaintiff for \$12,000. Upon appeal to the Appellate Division the judgment was reversed and a new trial ordered, without opinion, except that the Appellate Division stated that the judgment and order were reversed as against the weight of evidence, 139 App. Div. 923; 124 Supp. 1123. The case was again tried before Mr. Justice ALDEN CHESTER and a jury at the Albany County Trial Term on October 26th, 1910, and resulted in a verdict for \$15,000 in favor of the plaintiff. This judgment was reversed by the Third Department in a memorandum decision stating that the judgment was "unauthorized both as matter of law and as matter of fact." 145 App. Div. 900; 129 Supp. 1137. A new trial was ordered which was held before Mr. Justice CHESTER and a jury on September 26th, 1911, at the Albany County Trial Term, and upon this trial the same testimony and exhibits, by agreement of counsel, were put in evidence as had been placed before the jury on the third trial. At the close of the entire evidence the justice granted the defendant's motion for a non-suit and dismissal of the complaint. This judgment of non-suit was affirmed by the Appellate Division without opinion. 150 App. Div. 896; 134 Supp. 1140. It was from the judgment of non-suit that the appeal was taken.

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wagon traveling in the opposite direction at a point where the road had been narrowed by about three feet. On the edge of the road the land dropped away four or five feet. The difference in grade between the road and the land on the margin thereof was concealed by a growth of weeds. The plaintiff's intestate, not observing the embankment, ran the wheels of his car so close thereto that the car slid down the embankment and he was killed. The condition of the road was not due to any wear and tear but was originally constructed in this manner to avoid certain large trees which grew at the edge of the road some distance away. In an action against the town for negligence in maintaining this highway in a dangerous condition it was held that the question of the negligence of the highway authorities and the freedom from negligence of the plaintiff's intestate were questions which should have been submitted to the jury.

Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 2, 1912, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Nash Rockwood, L. B. McKelvey and John Scanlon for appellant.

Edgar T. Brackett and George B. Lawrence for respondent.

HISCOCK, J.:

This action is brought to recover damages alleged to have been caused by the death of appellant's intestate, which resulted from the capsizal, on the 27th day of June, 1908, of an automobile which he was driving over a road located within the respondent's boundaries. The automobile tipped or slid over a bank at the edge of the traveled roadway in the nighttime, and it is urged that the respondent is liable because no guard had been erected at the bank.

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The highway on which the accident happened was a much traveled one, being the principal line of travel between the cities of Albany, Troy and Cohoes on the south, and Ballston Spa, Saratoga Springs, Glens Falls and Lake George on the north. In the immediate locality of the accident it ran east and west, and was bounded on the north by a hill of considerable height, and there was on that side no descending bank or ditch of any consequence. On the south side, as one traveled from the west to the east, the adjacent land at first was on a level with the roadway, and then began to slope to a lower level, so that at a point just east of an elm tree, which figures in the case, there was, from the level of the traveled roadway first a sheer descent of between one and two feet, and then a further descending slope of about four feet on an angle of about 45 degrees. As the roadway approached the elm tree from the west it was at first fifteen feet and six inches wide, but because of the location of this tree and others on its southerly margin it became necessary to narrow the roadway somewhat abruptly, so that at and just easterly of the tree the width was only twelve feet and eight inches. This narrowed roadway and embankment continued for some distance easterly of the tree. Just easterly of the tree and at the point where the accident happened there was a fringe of weeds which grew above the level of the roadbed and concealed the edge thereof and embankment.

On the occasion in question the intestate with his wife and others had driven in an automobile northerly on this road beyond the place of the accident and in the afternoon had commenced the return journey to Albany where they lived. They did not reach the locality of the accident until after dark and as they approached the elm tree a horse and wagon was discovered approaching from the east. Intestate, who was driving and who seems to have been an experienced and careful driver, applied the brakes to his car and clearing the tree pulled to the southerly

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side of the road so as to allow the horse and wagon to pass him, and brought his car to a stop. He had, however, pulled too near the edge of the bank and as he stopped the car slipped down and over the bank turning over and killing him. It is stated without contradiction that the average width of an automobile is 67 inches and the tread of an ordinary farm vehicle is 56 inches, which would leave an aggregate leeway of about two feet as the vehicles attempted to pass at the point in question.

Plaintiff gave evidence for the purpose of showing that other accidents had happened at this place and no issue was presented on the trial concerning the possession by the highway commissioner of ample funds with which to construct a barrier and of which the expense would have been trivial.

The case has been tried several times, two judgments entered on verdicts in favor of the plaintiff having been reversed by the Appellate Division, and it was in accordance with the last decision of that court that the plaintiff was nonsuited on the last trial.

The respondent is not liable in this action unless its commissioner of highways would have been liable for negligence because not foreseeing the danger of such an accident as overtook appellant's intestate and guarding against the same by a barrier or other appropriate means. This much being conceded, the question remains whether the court should decide as matter of law that there was freedom from negligence chargeable to the town, or permit a jury to decide this question as one of fact. We have reached the conclusion that the latter is the proper course.

Here was a much traveled thoroughfare. It was no remote or unfrequented highway. By reason of causes which have been sufficiently described a roadway which might safely be traveled rapidly narrowed by almost three feet and the adjacent land from being level with the roadway turned into a sharp descending slope of

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several feet from the edge of the highway. There was no barrier or guard of any kind to mark the edge of the highway, but instead thereof weeds had been allowed to grow up which obscured and concealed such edge. The free space left on the passage of an automobile and a vehicle was very small and it was incumbent on the driver of the former to pull as near the edge as practicable and thus afford room for the passing horse which might be frightened by the too close proximity of the machine. The defects in the highway were not those which had come as the result of ordinary wear and tear and climatic changes but were inherent in its original and fundamental construction. It was of course to be expected by the respondent and its officials that vehicles of various kinds would pass each other on this highway by night as well as day, and we think that the appellant was entitled to have a jury say as a matter of fact whether they also ought not to have anticipated, in the exercise of ordinary foresight and prudence, that in the course of such passage one of them was liable to run over the bank unless some guard or barrier was erected.

As has often been said, a case of this kind is always more or less perplexing. There is no general and infallible rule by which to determine whether each case should be disposed of as a matter of law or by the verdict of a jury. Every one must largely be determined by its particular features. On the one hand, it may well be argued that a town may not be held to too strict a rule of liability whereby it shall be required to guard against every minor defect which may come in its roadways and from some of which no country highway is entirely free. On the other hand, it is equally apparent that a line must finally be reached where at least a jury shall be permitted to say whether such a municipality has or has not been guilty of negligence in respect of some particular defect. The difficulty in each case is to decide on which side of the line it is placed by its particular facts. After the

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careful consideration which they deserve, we have, as indicated, reached the conclusion that the facts now presented to us carry the respondent beyond the line of immunity as matter of law, and require that the issue of its freedom from negligence should be submitted to a jury.

In accordance with these views the judgment of the courts below should be reversed and a new trial granted, costs to abide event.

CULLEN, Ch. J., WILLARD BARTLETT, CHASE, CUDDEBACK, HOGAN and MILLER, JJ., concur.

Judgment reversed, etc.

 Form No. 39

Complaint; Highways; Municipal Corporation; Negligence; Overturn of a Motor Car while Turning out in the Dark to Make Room for Passage of Horse and Wagon, Alleged to Have Been Caused by Narrow and Unguarded Highway ¹

Supreme Court, Albany County.

Elizabeth M. Nicholson, as Administratrix of the Goods, Chattels and Credits of William S. Nicholson, De- ceased,	
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Plaintiff,

against

The Town of Stillwater,	
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Defendant.

The above-named plaintiff complains of the defendant, and alleges and shows:

¹ From *Nicholson v. The Town of Stillwater*, 208 N. Y. 203; rev'g 150 App. Div. 896; 134 Supp. 1140, no opinion. See *ante*, page 410. For Notice of Claim served on defendant municipal corporation see *post*, page 423.

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That the defendant, the said Town of Stillwater, was at all of the times hereinafter mentioned and now is a municipal corporation located in the County of Saratoga, State of New York, existing under the laws of said State, and is one of the towns of and within the said County of Saratoga, and one of the political divisions thereof.

That on the 27th day of June, 1908, one William G. Fuller was, and since the first day of January, 1908, had been, and ever since has continued to be the duly elected, qualified and acting sole Commissioner of Highways of the said Town of Stillwater; and that the said Fuller was one of the Commissioner of Highways of said town for a period of two years last past prior to January 1st, 1908.

That the care and superintendence of the highways within said Town of Stillwater is established and enjoined by law upon the Commissioner of Highways of said town, and among other things it is by law made the duty of said Commissioner of Highways to cause said highways to be kept in repair, and to give necessary directions therefor, and to inspect the highways and bridges in all highway districts within the said town, at such proper and sufficient number of times and with such care and oversight as to see that said highways in said town, and all of them, are in good repair and in a good, safe and passable condition, and in every way proper, safe and sufficient for persons, automobiles, vehicles and teams passing and traveling thereon, and also to see that all of said highways are of sufficient and proper width and in every way suitable and reasonably safe for the passage of persons, vehicles, automobiles and teams at all times; and it is also the duty of said Highway Commissioner to expend the moneys raised by and collected from said town for highway purposes, upon the highways and bridges situated therein, and to require the Overseer of Highways in said town to warn out all persons and corporations assessed to work on highways to come and work on the highways within said town with such teams and imple-

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ments, and at such times as said Commissioner shall direct.

Plaintiff further alleges upon information and belief, that the said Commissioner of Highways of said town, disregarding and neglecting his said duties for a long time prior to the accident and death of William S. Nicholson hereinafter mentioned, suffered and allowed a portion of one of the public highways of said town, which said highway had been used for the public travel for many years and had been recognized and treated by the Commissioner of Highways of said town, and the constituted authorities of said town as a highway, to wit: the main highway leading from the Village of Mechanicville to the Village or hamlet of Round Lake, at a point about four hundred (400) feet, more or less, southeasterly of the residence of one Guy Fitch in said town to be and remain in an unsafe, dangerous and unfit condition for persons, vehicles, automobiles and teams traveling upon or along said portion of said highway, notwithstanding the fact that such highway at said point was largely used for public travel by teams, automobiles, and by various kinds of vehicles, and has been so used for many years. That such unsafe, dangerous and unfit condition consisted in allowing said portion of said highway to be, upon said 27th day of June, 1908, and for some years prior thereto, of insufficient width for the safe passage of vehicles, automobiles and teams thereon, and to allow teams, vehicles and automobiles meeting at said point on said highway to pass each other and in failing to provide a highway at said point of sufficient width to permit teams, vehicles and automobiles to pass each other thereon; also that on and along the southerly side of said highway at said point there is, and was on said 27th day of June, 1908, and for some time prior thereto, a sudden and almost perpendicular embankment, and the level of said highway at said point is, and was on said date, some four or five feet above the surface or level of the ground below, and there,

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is no barrier or protection of any kind at said point to prevent travelers, teams, vehicles or automobiles passing along and over said highway at said point from driving or going off said highway and falling down and over said embankment to the ground below, nor was there any such barrier or protection on said 27th day of June, 1908, or prior thereto; also, in that said highway was so negligently constructed and maintained at said point on said date that large trees were allowed to be and remain thereon and within what should and would otherwise have been the traveled portion thereof, so that the roadway in said highway on said 27th day of June, 1908, and prior thereto, was diminished in width at said point in order that said highway should go around said tree and leave said tree standing, thereby making the traveled portion of said highway at said point, where the accident hereinafter described occurred, suddenly narrower by several feet than the portion of the highway immediately approaching said point; also in that the said Commissioner of Highways allowed the grass and weeds on the southerly side of said highway at said point to grow up and remain uncut, so that said weeds and grass on said 27th day of June, 1908, hid and obscured the true location of the outer or southerly line or edge of said highway, and so that said highway at said point had the appearance of having a width of surface suitable, safe and fit to travel thereon along the southerly edge or side thereof and considerably wider than the surface of said highway really was in fact; all of which said defects and said condition of said highway existed on said 27th day of June, 1908, and prior thereto; of all of which the said Commissioner of Highways of said town and said town had actual and constructive notice, and after such notice neglected to remove said trees or cause said grass and weeds to be cut or to cause said highway to be made of sufficient width for the safe travel of persons, teams, vehicles and automobiles thereon, or of sufficient width so that teams, vehicles and auto-

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mobiles could safely pass each other at said point on said highway, or to erect any barrier, railing or guard along said highway or embankment at said point to prevent travelers, teams, vehicles and automobiles traveling on and along said highway from driving or going off said highway and going down and over said embankment at said point.

Plaintiff further alleges that on said 27th day of June, 1908, at about the hour of 8:45 P. M., said William S. Nicholson, with his wife, the said Elizabeth M. Nicholson, and Mrs. Rosena Mosher and Miss Louise Brown, was carefully riding along said highway in an automobile, which was driven and operated by the said William S. Nicholson, going toward the Village of Mechanicville; that said automobile was at that time proceeding carefully and slowly, and all the lights thereon, including the two front headlights—it being at that time dusk—were lighted and burning. That at said point in said highway, to wit: about four hundred (400) feet southeasterly from the residence of said Guy Fitch, said automobile, so being driven by said William S. Nicholson, met a horse and carriage on said highway, and said Nicholson, in the belief that said highway was of sufficient width to permit him to do so, turned his said automobile, which was at that time running very slowly and was under full control, carefully to the right to pass said horse and carriage, and in so turning out, because of the insufficient width and other defects in said highway therein set forth, the said automobile went suddenly down said embankment and, with its said occupants therein, was overturned and the said William S. Nicholson's neck was then and there broken in consequence thereof, and he, the said William S. Nicholson, then and there died because of said broken neck and the injuries so received by him at that time, and the other occupants of said automobile, other than the said Louise Brown, received painful and severe injuries.

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That the said highway at said point had the appearance, because of the said growth of grass and weeds along the southerly edge or side thereof, as aforesaid, of being considerably wider than it in fact really and actually was, and the growth of said weeds and grass along said side or edge of said highway deceived said Nicholson and the other occupants of said automobile as to the real and actual width of said highway at said point. That had the said roadway of said highway been as wide as it appeared to be, and as it should have been provided said trees had been removed and had the growth of said grass and weeds along said edge or side of said highway not obscured the true and actual line and width of said highway and the solid portion thereof and the point where said embankment actually commenced and existed, and had said highway not been so narrowed at said point so that the same could pass around said trees, there would have been plenty and sufficient room and plenty and sufficient solid ground for the wheels on the southerly side of said automobile to have traveled and rested upon in turning out as aforesaid to go by said horse and carriage, and said accident would not have occurred.

Plaintiff further alleges, upon information and belief, that said William S. Nicholson was a careful and skillful operator of automobiles, and was at the time of said accident proceeding slowly and with due caution, relying upon the belief that said roadway was substantially of a uniform width; and that said accident happened solely because of the negligence and carelessness of said Commissioner of Highways and of said town, in maintaining at said point said highway of insufficient and improper width to permit persons, teams, vehicles and automobiles traveling thereon to pass each other safely, as aforesaid, and in failing to erect and maintain and have at the time of said accident any barrier, railing, guard-rail or other structure along the southerly edge or side of said highway and along the top of said embankment to prevent travelers

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on said highway from going down and over said embankment, and in permitting the grass and weeds to grow and remain along the southerly side or edge of said highway at said point, and in not removing said trees, so that said highway had the appearance of being wider at said point than it really was in fact, and of being safe and fit for travel thereon, and that the point or place where said accident occurred was an unsafe place for public travel.

That said accident happened without any fault, carelessness or negligence on the part of said William S. Nicholson or any of the occupants of said automobile, and was due solely to the negligence, want of care and omissions on the part of said Commissioner of Highways and of said defendant, hereinbefore specified.

Plaintiff further alleges upon information and belief, that the said automonile was on said 27th day of June, 1908, owned by the said William S. Nicholson, and was at such time duly registered in the office of the Secretary of State of the State of New York, as required by the Motor Vehicle Law, in the name of said William S. Nicholson as owner thereof, and had at such time on it, duly displayed as required by law, the number assigned to it by such Secretary of State, and that all the provisions and requirements of law necessary to be observed and done for the lawful operation and running of said automobile on the highways of the State of New York by the said William S. Nicholson had been duly observed, complied with and done, and that said automobile was at such time, with its occupants, lawfully traveling and running on said highway, and the said Nicholson was at such time lawfully operating the same as chauffeur and owner as aforesaid.

That the said William S. Nicholson died intestate and left him surviving a wife and next of kin, and was at the time of his death a resident of the City of Albany in the County of Albany and State of New York; that the said Elizabeth M. Nicholson, the plaintiff herein, is the widow

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of said William S. Nicholson, and was duly appointed sole administratrix of the goods, chattels and credits of said William S. Nicholson, by letters of administration duly granted by the Surrogate of Albany County on the 29th day of July, 1908, and that she thereafter duly qualified and is now acting as such administratrix.

Plaintiff further alleges upon information and belief, that a duly verified statement of the cause of action hereinbefore set forth, was duly presented to Perry Condon, the Supervisor of said Town of Stillwater, on behalf of the plaintiff within six months after the cause of action accrued, to wit:—on the 2d day of November, 1908, and that this action, which is brought for the same cause of action contained in said statement, was not commenced until more than fifteen days after the service of such statement, and that no other action has been commenced on account of said cause of action. A copy of said statement, so presented, is hereto annexed and marked Exhibit "A," and is hereby referred to the same as if herein written at length.

That by reason of the injury and death aforesaid, plaintiff has been put to great expense and suffered great damages, viz.: the sum of one hundred thousand dollars (\$100,000.00).

WHEREFORE plaintiff demands judgment against the defendant in the sum of one hundred thousand dollars (\$100,000.00), with interest from the 27th day of June, 1908, together with the costs of this action.

ROCKWOOD, SCOTT & MCKELVEY,
Plaintiff's Attorneys,

378 Broadway, Saratoga Springs, N. Y.

[Verification.]

Notice of Claim

Form No. 40

**Notice of Claim; Highways; Municipal Corporation; Negligence;
Overturn of a Motor Car while Turning Out in the Dark to Make
Room for Passage of Horse and Wagon, Alleged to Have Been
Caused by Narrow and Unguarded Highway¹**

Supreme Court, Albany County.

In the matter of the claim of
Elizabeth M. Nicholson,
as Administratrix of the
goods, chattels and credits
which were of William S.
Nicholson, deceased,
against
The town of Stillwater.

To Perry Condon, Supervisor of the Town of Stillwater,
New York:

PLEASE TAKE NOTICE, That the undersigned, as administratrix of the goods, chattels and credits which were of William S. Nicholson, deceased, hereby make claim for damages against said Town of Stillwater, in the sum of one hundred thousand dollars (\$100,000) for personal injuries which were sustained by said William S. Nicholson, resulting in the death of said William S. Nicholson by reason of the negligence of said town, its Commissioner of Highways, agents, officers and servants.

Said injuries were received on the 27th day of June, 1908, on the highway in said town leading from Mechanicsville to Round Lake at a point about four hundred (400) feet southeast of the residence of one Guy Fitch in said

¹ From *Nicholson v. The Town of Stillwater*, 208 N. Y. 203; rev'g 150 App. Div. 896; 134 Supp. 1140, no opinion. See *ante*, page 410. For Complaint from this case see *ante*, page 415.

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town, and were caused by the negligence of the said town, its Commissioner of Highways, officers, agents and servants, in constructing and maintaining at said point a public highway of insufficient width for the safe and proper passage of vehicles thereon, and in leaving the southerly side of said highway, where the same was too narrow for the safe and proper passage of vehicles thereon, and along and below which there was a sudden and abrupt declivity of some five or six feet to the ground below the surface of the roadway, unguarded and unprotected by any barrier or otherwise to prevent travelers along the same from driving off or falling from said highway; also in allowing the grass and weeds at said point to grow up and remain uncut so that said highway at said point had the appearance of having width or surface suitable and fit for travel thereon along the southerly edge or side thereof considerably wider than the surface of such highway really was in fact, and when, in fact, there was a steep embankment or declivity at said point which such grass and weeds obscured, and with no earth or material whatever on which vehicles could travel; also in maintaining a highway at and along such point and portion that was dangerous and unfit for travel thereon with vehicles, because of its improper and insufficient width and want of any and all barriers to prevent travelers from driving or going over the edge of the embankment along the southerly side thereof down to the level or surface of the ground some five or six feet below.

That said highway was so negligently constructed and maintained at said point that large trees were allowed to be and remain thereon and within what would otherwise have been the traveled portion thereof, so that said roadway was diminished in width in order to go around said trees, thereby making the traveled portion of said highway, where said accident occurred, narrower by several feet than the portion of said highway immediately approaching it, the said Nicholson believing said high-

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way to be of uniform width, was deceived thereby, to his great damage as herein set forth.

That on said date, at about the hour of 8:45 o'clock P. M., said William S. Nicholson, with his wife, the said Elizabeth M. Nicholson, and Mrs. Rosena Mosher and Miss Louise Brown, were riding along said highway, going toward Mechanicville, N. Y., in an automobile which was driven and operated by the said William S. Nicholson; that such automobile was at the time proceeding carefully and slowly and all the lights thereon, including the two front lights, were burning brightly, so that the surface of said highway was fully and plainly visible to the occupants of such automobile; that at a point about four hundred (400) feet southeast of the residence of Guy Fitch on said highway, said William S. Nicholson met a horse and carriage in said highway, and in turning out to pass said horse and carriage the wheels on the southerly side of said automobile went down and over the embankment on the southerly side of said highway, and said automobile, with its occupants, was overturned, and in consequence thereof said William S. Nicholson's neck was broken, and he then and there died because of such injuries.

That the highway at said point had the appearance, because of the growth of grass and weeds along the edge thereof, of being wider than it in fact was, and the growth of such grass and weeds deceived the said Nicholson as to the width of said highway. That said Nicholson and the occupants of such automobile were at such time free from any and all negligence.

And You Will Also Take Notice, That the undersigned was duly appointed administratrix of the goods, chattels and credits of the said William S. Nicholson by the Surrogate of Albany County, New York, of which said county the said William S. Nicholson was at the time of his decease, a resident; and that the undersigned as administratrix, as aforesaid, intends to commence an action

Notice of Claim

against the Town of Stillwater to recover such damages in said amount of one hundred thousand dollars (\$100,000.00).

Dated, October 23d, 1908.

(Signed) ELIZABETH M. NICHOLSON, Administratrix of the Goods, Chattels and Credits of William S. Nicholson, Deceased.

State of New York, }
City and County of Albany, } ss:

ELIZABETH M. NICHOLSON, being duly sworn, says, that she is the claimant named in the foregoing statement of cause of action and claim subscribed by her, and resides at Albany, N. Y.; that she has read the said statement of cause of action and claim and knows the contents thereof; that the same is true to her own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters she believes it to be true. That no part of said claim or cause of action has been paid or satisfied.

(Signed) ELIZABETH M. NICHOLSON.

Subscribed and sworn to before }
me this 23d day of October, 1908. }

(Signed) W. BURT COOK, Jr.,
Notary Public Saratoga County,
Certificate filed in Albany County.

State of New York, }
County of Albany, } ss:
Clerk's office.

I, JOHN FRANEY, Clerk of the said County, and also Clerk of the Supreme Court and County Courts, being Courts of Record held therein, do hereby certify, that W. Burt Cook, Jr., has filed in the Clerk's office of the County of Albany, a certified copy of his appointment as Notary Public for the County of Saratoga, with his

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autograph signature and was, at the time of subscribing his name to the jurat of the annexed affidavit, duly authorized to administer oaths for general purposes. And further, that I am well acquainted with the hand-writing of such Notary, and verily believe the signature to the said jurat to be genuine.

In testimony whereof, I have hereunto set my hand and affixed my official seal as County Clerk and Clerk of said Courts, this 23d day of October, 1908.

(Signed) JOHN FRANEY,
Clerk.

[Seal.]

GUSTAVE MEYERS, Plaintiff, v. CLAYTON H. WILCOX,
Defendant

(Supreme Court, Kings County, Special Term, December 16, 1912)

Pleading; demurrer to complaint; leave to answer after Appellate Division has affirmed interlocutory judgment overruling demurrer; serving copy of proposed answer with motion papers

1. After an interlocutory judgment overruling a demurrer to a complaint has been affirmed by the Appellate Division without giving the defendant leave to withdraw the demurrer and interpose an answer, a motion for leave to answer should be made to the Appellate Division.
2. In such a case the motion papers should contain a copy of the proposed answer and reasons should be stated for the default in answering.

Motion by the defendant for permission to answer.
Denied.

Edward E. Dean, attorney for the plaintiff.

Hiram D. Messenger, attorney for the defendant.

ASPINALL, J.:

This motion must be denied for the following reasons: First. No proposed answer was served with the moving papers, and no excuse is made for the default in answering, or any reason given why the judgment should be vacated and set aside. Second. Upon the further ground that the Appellate Division having affirmed the interlocutory judgment without giving defendant leave to answer, the motion must be made to the Appellate Division and not to Special Term.

OTTO ADLER, Plaintiff, v. GUSTAVE MORIO, Defendant.

(Supreme Court, Kings County Special Term, September 24, 1913)

Costs on motion for bill of particulars when demand therefor ignored

1. When a demand for a bill of particulars, in a case in which the party is clearly entitled thereto, has been ignored, the court in granting the motion therefor should award costs to the moving party.

Motion for bill of particulars.

Granted.

William F. O'Connor, attorney for the plaintiff.

John B. Merrill, attorney for the defendant.

KELLY, J.:

Motion denied. Apparently the defendant must obtain an order for these particulars in a suit for negligence, but service of the demand does not prejudice plaintiff. If defendants would serve demands and if plaintiffs would comply with the demands when there is absolutely no reason for refusing them, the time of the court and counsel

Opinion of the Court

would be saved. A large part of each day's motion calendar is made up of applications for bills of particulars to which no objection is made and which should have been granted if demanded. In the case at bar the particulars asked should be given. If defendant is put to a motion, costs should be allowed him. Order signed.

EDWARD L. KIRSCHENBAUM, Plaintiff, *v.* BENJAMIN H.
KAUFMAN, Defendant

(City Court of the City of N. Y., October 22, 1913)

Libel and slander; publication of slanderous words; presence of business associate at whose instance alleged libellous words were uttered

1. When the only person present when alleged libellous words were uttered was the brother-in-law and associate in business of the defendant who was one of those at whose instance the charges were made, it was held that this was not such a publication as would sustain an action for damages.¹

Motion to set dismissal of the complaint and for a new trial.

Denied.

Philip Simon, attorney for the plaintiff.

Norbert Heinsheimer, attorney for the defendant.

SMITH, J.:

Upon the trial of this action, at the conclusion of the plaintiff's case, the complaint was dismissed for the reason that the evidence did not show publication of the alleged libel, and the plaintiff now moves for a new trial. The only question to be determined, therefore, is whether

¹ No appeal was taken from the decision in this case.

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there was such a publication of the alleged libel as would entitle the plaintiff to maintain an action and recover damages therefor. While it is true, as a general rule, that the presence of a third person at the time when the libel is uttered makes the same actionable, still, the law as laid down in the case of *Annie Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465; 53 Supp. 1033, distinguishes between the third person as an outsider and one practically constituting a portion of the general public and one who is associated with and practically identified with the person uttering the alleged libelous words. In that case the court held that there was no publication of the libel where a letter having reference to business matters was dictated by the manager of a corporation to a stenographer employed by it. In the case at bar the only person claimed by the plaintiff to have been present at the time when the alleged libel was uttered was the brother-in-law and associate in business of the defendant and one of those at whose instigation the charges against the plaintiff were made, so that it seems to me that the claim that statements made in his presence by the defendant were made publicly in such a manner that the plaintiff could be injured is contrary to the conception of what constitutes a third person in the eyes of the law. If the rule is applicable to a stenographer who is in the employ of the defendant, it seems to me it should apply with equal force to a partner or business associate of the defendant, especially when that person was the one who primarily made the charges upon which the alleged libel was founded. I can see, therefore, no reason for granting the motion for a new trial and the motion is denied. Plaintiff may, if he so desires, have ten days' stay and thirty days to serve a case on appeal. Settle order on notice.

In the Matter of Supplementary Proceedings of FUNK & WAGNALLS COMPANY, Judgment Creditor, v. ALEXANDER NECHAMKIN, Judgment Debtor.

(City Court of the City of N. Y., October 22, 1913)

Supplementary proceedings; second order for examination; serving additional affidavit; discontinuance of first proceeding

1. In a second examination of a judgment debtor the court may permit the service of an additional affidavit, showing that since the previous examination the debtor has acquired property not exempt from execution, as the omission of this proof from the application for the second examination was not a jurisdictional defect.
2. It is not necessary that the first examination be discontinued before a second order can be made to reach after acquired property.¹

Motion to vacate an order for examination of a judgment debtor in supplementary proceedings.

Denied.

David J. Gladstone, attorney for the judgment creditor.

William Rabinowich, attorney for the judgment debtor.

O'DWYER, C. J.:

The additional affidavit submitted in support of the order for the examination of the judgment debtor states that since the examination of the debtor in May, 1911, he has acquired property not exempt by law from execution, and the kind and character of that property is shown. The omission of this proof in the moving affidavit did not

¹ No appeal was taken from the decision in this case.

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affect the jurisdiction of the judge to grant the order for the debtor's examination, and it is entirely proper at this time to permit the creditor to supply the proof entitling it to that second order and examination. *Marshall v. Link*, 13 Supp. 224. It is not necessary that the first proceeding be discontinued in order to maintain a second, as each relates to property of the debtor at different periods of time. The first proceeding can in no way affect property acquired subsequent thereto. Motion to vacate order denied, without costs. Examination to be limited to property acquired since last examination. Judgment debtor's default noted, to be opened if he appears at Special Term Part II, on October 27, 1913, at 10 A. M., and submits, to examination.

MARX OTTINGER et al., Appellants, v. JOHN R. BENNETT,
Respondent, Impleaded with Others ¹

(203 N. Y. 554; rev'g on dissenting opinion of MARTIN, J., below, 144 App. Div. 525; 129 Supp. 819)

Corporations; action against directors by purchaser of stock in the open market upon the strength of the declaration of a dividend, which, it is alleged, was declared from the capital and not from surplus profits ²

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial De-

¹ For Complaint from this case, see *post*, page 434.

² In the opinion of the court below and in the dissenting opinion of Mr. Justice MARTIN, which the Court of Appeals adopts, there is considerable discussion as to the effect of a statement in a prospectus that a corporation had paid dividends. Mr. Justice MARTIN contended that such a statement carried with it a representation that such dividends had been earned and that they were paid out of the surplus profits. He cited one New York case (*Keeler v. Seaman*, 47 Misc. 292; 95 Supp. 920) and an English case decided in 1839. (*Steinbach v. Fernley*, 8 L. J. Ch. 142; 3 Jur. 262.) See *Ottinger v. Bennett*, 144 App. Div. 525, dissenting opinion of MILLER, J., at page 534. Since Mr.

Statement of the Case

partment, entered May 19, 1911, which reversed an interlocutory judgment of Special Term sustaining a demurrer to a partial defense contained in the amended answer of the defendant Bennett and overruled such demurrer.

The following questions were certified:

“FIRST: Does the complaint state facts sufficient to constitute a cause of action?

“SECOND: Is the partial defense contained in the answer of the defendant John R. Bennett insufficient in law upon the face thereof?”

Nathan Ottinger for appellants.

Thomas D. Adams for respondent.

Order of Appellate Division reversed and interlocutory judgment affirmed, with costs in both courts, on dissenting opinion of MILLER, J., below, and both questions certified answered in the affirmative.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

Justice MILLER wrote that opinion the point has been settled by the Court of Appeals to the effect that a declaration that dividends have been paid imports that they have been earned. *Downey v. Finucane*, 2 Bradbury's Pl. & Pr. Rep. 377; 205 N. Y. 251. See the Complaint from the last-mentioned case in 2 Bradbury's Pl. & Pr. Rep. 389. The case of *Downey v. Finucane*, *supra*, was also an action for fraud in the sale of stock.

See also the cases of *Van Slochem v. Villard*, *ante*, page 98; *Childs v. White*, *ante*, page 388, and *Rives v. Bartlett*, *post*, page 443.

Complaint

Form No. 41

Complaint; Corporations; Action Against Directors by Purchaser of Stock in the Open Market upon the Strength of the Declaration of a Dividend, which, it is Alleged, was declared from Capital and not from Surplus Profits ¹

Supreme Court, New York County.

Marx Ottinger and Moses
Ottinger,

Plaintiffs,

against

John R. Bennett, Oren Den-
nett, David W. Hunt,
"James" Manchester
Haynes, the said name
James being fictitious, real
first name being unknown
to plaintiffs, "Robert" W.
Hopkins, the said name
Robert being fictitious, real
first name being unknown to
plaintiffs, Charles W. Morse,
Harry F. Morse, James Mc-
Cutcheon, Wesley M. Oler,
James W. Barney and Ash-
bel H. Barney, as Executors
of the Last Will and Testa-
ment of Charles T. Barney,
deceased; Ruel W. Poor,
Edward H. Robb, Thomas
Sturgis, John D. Schoon-
maker and Joseph W. Scott,
Defendants.

Plaintiffs, complaining of the defendants, respectfully
allege and show to the Court as follows:

¹ From *Ottinger v. Bennett*, 203 N. Y. 554; rev'g 144 App. Div. 525;
129 Supp. 819. See *ante*, page 432.

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1. Upon information and belief that at all the times hereinafter mentioned American Ice Company was a corporation organized and incorporated under the laws of the State of New Jersey.

2. Upon information and belief that during all the times hereinafter mentioned the said American Ice Company was engaged in the business of dealing in and manufacturing ice.

3. Upon information and belief that at all the times hereinafter mentioned the capital stock of the said American Ice Company was divided into shares of two kinds, viz: preferred and common stock, and that at all the times hereinafter mentioned there were issued and outstanding about 229,219 shares of the said common stock, of the par value of \$100 per share.

4. Upon information and belief that on or about January 1, 1902, and thereafter, until on or about the 28th day of March, 1904, the laws of the State of New Jersey, applicable to corporations incorporated in that State and applicable to the said American Ice Company, provided among other things, as follows:

“No corporation shall make dividends, except from the surplus or net profits arising from its business, nor divide, withdraw, or in any way pay to the stockholders, or any of them any part of its capital stock, or reduce its capital stock, except according to this act, and in case of any violation of the provisions of this section, directors under whose administration the same may happen shall be jointly and severally liable, at any time within six years after paying such dividend, to the corporation, and to its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend made or capital stock so divided, withdrawn, paid out or reduced with interest on the same, from the time such liability accrued; provided, that any director who may have been absent when the same was done, or who may have dissented from the act or resolution by which the

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same was done, may exonerate himself from such liability by causing his dissent to be entered at large on the minutes of the directors, at the time the same was done, or forthwith after he shall have notice of the same, and by causing a true copy of said dissent to be published, within two weeks after the same shall have been so entered, in a newspaper published in the county where the corporation had its principal office."

5. Upon information and belief, that on or about January 23d, 1902, the directors of the said American Ice Company, at a meeting of the Board of Directors of the said company, declared a dividend of one per cent (1%), or \$1 per share, upon the common stock of the said American Ice Company payable to stockholders of record, at the close of business on February 1st, 1902.

6. Upon information and belief, that on or about February 15, 1902, the dividend declared as in the preceding paragraph 5 of this complaint set forth, was paid by said American Ice Company to the said stockholders of record.

7. Upon information and belief, that said dividend mentioned in paragraph 5 was the last dividend declared upon the common stock of the said American Ice Company.

8. Upon information and belief, that the said dividend mentioned in said paragraph 5 of this complaint was not made or declared from the surplus or net profits arising from the business of said American Ice Company.

9. Upon information and belief, that the said dividend in paragraph 5 of this complaint mentioned was never earned by said American Ice Company.

10. Upon information and belief, that the said dividend mentioned in paragraph 5, aforesaid, was declared and paid out of the capital of the said American Ice Company.

11. Upon information and belief, that at all times in this complaint mentioned, said American Ice Company did and still does business in the State of New York,

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having duly obtained the certificate required by Section 15 of the General Corporation Law of the State of New York, in or about April, 1899.

12. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant John R. Bennett, was a director of said American Ice Company.

13. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant Oren Dennett was a director of said American Ice Company.

14. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant David W. Hunt, was a director of said American Ice Company.

15. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant "James" Manchester Haynes was a director of said American Ice Company.

16. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant "Robert" W. Hopkins was a director of said American Ice Company.

17. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant Charles W. Morse was a director of said American Ice Company.

18. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant Harry F. Morse, was a director of said American Ice Company.

19. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant James McCutcheon, was a director of said American Ice Company.

20. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defend-

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ant Wesley M. Oler, was a director of said American Ice Company.

21. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant Ruel W. Poor, was a director of said American Ice Company.

22. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, one Charles T. Barney, was a director of said American Ice Company.

23. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant Edward H. Robb was a director of said American Ice Company.

24. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant Thomas Sturgis was a director of said American Ice Company.

25. Upon information and belief, that at all the times between January 1, 1902, and March 1, 1902, the defendant John D. Schoonmaker was a director of said American Ice Company.

26. Upon information and belief, that the declaration of the dividend mentioned in paragraph 5 of this complaint was a representation to the effect that such dividend had been earned and declared from the surplus or net profits arising from the business of the American Ice Company.

27. Upon information and belief, that each of the directors aforesaid, mentioned in paragraphs 12 to 25, both inclusive, of this complaint, intended that the said declaration of the said dividend mentioned in paragraph 5 of this complaint should be, and should be regarded by the general public as, a representation that the said dividend had been earned and declared from the surplus or net profits arising from the business of the said American Ice Company.

28. Upon information and belief, that said John R. Bennett well knew at the time that the said dividend men-

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tioned in paragraph 5 of this complaint was declared that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

29. Upon information and belief, that said Oren Dennett well knew, at the time that the said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

30. Upon information and belief, that said David W. Hunt well knew, at the time that the said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

31. Upon information and belief, that said "James" Manchester Haynes well knew, at the time that the said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

32. Upon information and belief, that said "Robert" W. Hopkins well knew, at the time that the said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

33. Upon information and belief, that said Charles W. Morse well knew, at the time that the said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared, from the surplus or net profits arising from the business of the said American Ice Company.

34. Upon information and belief, that said Harry F. Morse well knew, at the time that the said dividend mentioned in paragraph 5 of this complaint was declared,

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that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

35. Upon information and belief, that said James McCutcheon well knew, at the time that the said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

36. Upon information and belief, that said Wesley M. Oler well knew, at the time that the said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

37. Upon information and belief, that said Charles T. Barney well knew, at the time that the said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

38. Upon information and belief, that said Ruel W. Poor well knew, at the time that said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

39. Upon information and belief, that said Edward H. Robb well knew, at the time that the said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

40. Upon information and belief, that said Thomas Sturgis well knew, at the time that the said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared from

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the surplus or net profits arising from the business of the said American Ice Company.

41. Upon information and belief, that said John D. Schoonmaker well knew, at the time the said dividend mentioned in paragraph 5 of this complaint was declared, that the same had not been earned and was not declared from the surplus or net profits arising from the business of the said American Ice Company.

42. Upon information and belief, that after the declaration of the said dividend the said directors caused the fact of the declaration of the same to be published in the newspapers and to be disseminated among the public.

43. Upon information and belief, that none of the directors aforesaid ever caused his dissent to be entered at large or otherwise on the minutes of the directors of the said American Ice Company, or caused a copy of any dissent therefrom to be published at any time in any newspaper in the County of the State of New Jersey where the American Ice Company had its principal office, at any time mentioned in this paragraph, or in any other newspaper.

44. That the plaintiffs on or about February 13, 1902, purchased 100 shares of the said common stock of the said American Ice Company at the price of $\$27\frac{1}{4}$ per share, and on or about March 5, 1902, purchased an additional 200 shares of the said common stock of the said American Ice Company at the price of $\$28$ per share, and on or about April 28, 1900, purchased an additional 100 shares of the said common stock, at the price of $\$17\frac{3}{4}$ per share, and on or about August 25, 1902, purchased an additional 200 shares of the said common stock at the price of $\$12\frac{1}{2}$ per share, making a total paid by the plaintiffs for their said shares of stock, amounting, with broker's commissions, to $\$12,675$.

45. Upon information and belief, that at the time of the declaration of the said dividend, each of the said directors well knew that the aforesaid representations were wholly

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false, and that said representations were made with intent on the part of each of said directors, to deceive the public, and to induce members of the public to purchase shares of the said common stock of the said American Ice Company, and that said directors conspired together for that purpose, and that the plaintiffs, relying upon said representations and believing them to be true at the time of each of the purchases mentioned in paragraph 44 of this complaint, made their said several purchases of stock mentioned in paragraph 44 of this complaint.

46. Upon information and belief, that if the dividend mentioned in paragraph 5 of this complaint had been declared out of the earnings or surplus or net profits of the said American Ice Company, each share of the said common stock of the said American Ice Company would have been of the reasonable value of \$50.

47. Upon information and belief, that at the time of the declaration of the said dividend mentioned in paragraph 5 of this complaint, each share of the common stock of the said American Ice Company was intrinsically worthless, or of practically no value.

48. Upon information and belief, that since the purchase of said stocks by plaintiffs, the market price of the said common stock of said American Ice Company declined to a point where said market price, as well as said intrinsic value of the said stock, is practically nothing.

49. Upon information and belief, that by reason of the facts aforesaid, plaintiffs have been damaged in the sum of \$30,000.

50. Upon information and belief, that on or about the 14th day of November, 1907, said Charles T. Barney died, leaving a last will and testament, which was duly probated in the office of the Surrogate of the County of New York, and thereafter and on or about the 23d day of November, 1907, the defendants James W. Barney and Ashbel H. Barney, as executors of the last will and testament of said Charles T. Barney, deceased, duly

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qualified as such, and ever since have acted and are now acting as such.

Wherefore, plaintiffs demand judgment against the defendants in the sum of \$30,000, together with interest upon \$5,000 thereof from February 13, 1902, and with interest on \$10,000 thereof from March 5, 1902, and with interest on \$5,000 thereof from April 28, 1902, and with interest on \$10,000 thereof from August 25, 1902, together with the costs and disbursements of this action.

NATHAN OTTINGER,
Attorney for Plaintiffs,
No. 60 Wall Street,
Borough of Manhattan,
New York City.

[*Verification.*]

GUSTAVE RIVES, Respondent, v. JOHN R. BARTLETT and Another, Impleaded with HERMANN DE SELDING, and Others, Appellants.¹

(156 App. Div. 552; 141 Supp. 561; appeal pending to Court of Appeals)

Corporations; fraud; false statements in prospectus; rescission of subscription to stock; liability of directors

1. Where a prospectus containing false statements, the natural tendency of which would be to deceive and mislead the public, had been issued with the knowledge of the directors of a corporation, such directors are liable to persons who have bought stock on the strength of the statements contained in the prospectus, and in such cases the directors cannot wilfully shut their eyes to the acts of other officers or agents of the company as to methods used to procure money from the public.

¹ For Complaint from this case, see *post*, page 455.

See the cases of *Childs v. White*, *ante*, page 388, and *Ottinger v. Bennett* *ante*, page 432.

Appeal by the defendants, Hermann De Selding and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 13th day of September, 1912, upon the decision of the court rendered after a trial at the New York Special Term.

William G. Peckham (*Eugene Frayer* of counsel), for the appellants De Selding and Tubby.

Kendall & Herzog (*Paul M. Herzog* of counsel), for the appellant Hill.

Charles S. Aronstam for the respondent.

INGRAHAM, P. J.:

The defendant the Reade-Duane Cold Storage Company, a corporation organized under the laws of this State, issued a circular, signed by its president, defendant Bartlett, to secure the investment of money in the preferred stock of the company, the company offering to give an equal amount of paid-up common stock as a bonus. A copy of that circular was sent to the plaintiff, who resided in Paris, and was by profession an architect, by the president of the corporation, Bartlett. By a letter accompanying this circular Bartlett offered to the plaintiff the privilege to subscribe \$5,000 or \$10,000 or more for himself and friends named in the circular and personally guaranteed the plaintiff against any loss whatever. Relying upon this circular, the plaintiff subscribed for \$5,000 of the preferred stock of the corporation, and on September 29, 1906, transmitted \$5,000 to Bartlett, which he used for the purposes of the corporation. At the same time the plaintiff procured one Lehman-Charley, also residing in Paris, to subscribe \$20,000 for the preferred stock of this company, and that amount was also trans-

mitted to Bartlett and by him applied to the use of the corporation.

An action was commenced by Lehman-Charley against the defendants in this action to rescind that subscription of \$20,000 to the preferred stock of the corporation and to recover the amount paid, on the ground that the circular contained fraudulent and untrue statements upon which the plaintiff relied in making the subscription to the preferred stock. All of the individual defendants in this present action were defendants in the former action except the defendant Hill, who was named as a defendant, but not served with process. That action resulted in a judgment for the plaintiff, the subscription was rescinded and judgment for the amount of the subscription was rendered against all the defendants before the court. On appeal to this court that judgment was affirmed (135 App. Div. 674; 120 Supp. 501), and was also affirmed in the Court of Appeals. (202 N. Y. 524.) The facts upon which that action was based appear in the opinion written in that case and it is not necessary to restate them. Generally speaking, it may be said that this circular was false and fraudulent; that it contained untrue statements of material facts, the natural tendency of which was to deceive and mislead the public and induce it to purchase the stock, and that defendants Bartlett, De Selding and Tubby were responsible for the issuance of the circular and responsible to the plaintiff for the amount paid by the plaintiff, relying on the circular, for the preferred stock of the corporation. All of the questions presented in this case were determined by that case, except the question as to whether the defendants De Selding, Tubby and Hill were responsible for the issuance of the circular, it being claimed in this case that the evidence is substantially different as to the connection of these individual defendants with the issuance of the circular and their responsibility for its fraudulent character. The only question, therefore, that I will discuss is the connection of these appellants with the issuance of

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the circular and the use of it to procure subscriptions by the public generally and by this plaintiff particularly to the stock of the corporation.

This corporation was incorporated June 8, 1906, and on June 11, 1906, the incorporators met for the purpose of organizing the corporation. By-laws were adopted and a resolution was also adopted offering to purchase from John R. Bartlett, not one of the incorporators, all of his light, title and interest to certain property in the city of New York for a consideration of \$1,575,000—\$75,000 in fully paid, non-assessable preferred stock at par, \$1,500,000 in fully paid, non-assessable common stock at par. Bartlett's only interest in this property was a contract to purchase it, subject to mortgages, on which \$25,000 appears to have been paid, the price stated in the contract being \$550,000. The defendant De Selding was one of the incorporators, but neither of the other defendants were incorporators. De Selding was elected treasurer. A contract was then made between the corporation and Tubby, who was to render services as an architect. On the same day was held the first meeting of the board of directors of this corporation, at which the purchase of Bartlett's interest in the property was ratified and approved and the officers of the corporation authorized to issue the stock provided therefor. Peck, one of the incorporators, who had been elected president, then resigned and Bartlett was elected director and president in his place. One Gaines then resigned as director and Hill was elected in his place. De Selding resigned as treasurer and Bartlett was elected in his place. On July 16, 1906, another meeting of these directors was held, when Taylor resigned as director and Tubby was elected in his place. On September 5, 1906, another meeting of the directors was held, which is described in the minutes as an adjourned meeting of August 31, 1906. At that meeting the contract with defendant Tubby was approved and a contract with defendant Hill, who was described as a cold storage

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expert, was accepted and approved. De Selding was a real estate broker and he had charge of the property which was to be purchased, and acted as broker in the purchase of the property. The organization then being completed, Bartlett, the president, having all the shares of stock which had been issued to him in exchange for the transfer of his contract to purchase the property for \$550,000, of which \$25,000 had been paid—De Selding, the agent of the property, Tubby, the architect, having the contract for the erection of the buildings on the property, and Hill, the cold storage expert, having the contract for the payment for services rendered, being directors—all that was needed was money with which to carry into effect the object for which the corporation had been formed. Bartlett seems to have been the directing spirit in the enterprise, assisted as he was by these defendants, who were directors in the company and who furnished to him such information and technical advice and assistance as was necessary to carry the scheme into effect. The scheme was to erect upon this property, which had been purchased, a cold storage warehouse and, as is usual in transactions of this character, estimates of the profits that were to be secured to the corporation by the transaction of cold storage business and of the cost of the buildings to be erected prepared.

In May, 1906, a circular was prepared containing a statement of the purpose of the corporation, description of the property to be procured and the building to be erected, an estimate of the cost of the building with the incidental expenses to start the corporation in operation, and an estimate of the annual revenues to be received from the business after it was started. As I understand it, none of the defendants deny their share in the preparation of this May circular. The information contained in this circular was furnished to Bartlett by these three defendants, who are now appellants, and it was stated that the net cost of the property and the building to be erected

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upon it and the expense of organizing the corporation would be \$1,850,000. Of this amount it was intended to raise \$1,000,000 by a mortgage and \$850,000 by the sale of preferred stock at par. The common stock was to be issued and a part distributed to subscribers of the preferred stock as a bonus and the remainder issued to Bartlett and his associates in payment for their interest in the property and their assistance in erecting the building and organizing and developing the business. The estimated annual revenue from all sources was \$324,835 from which amount was to be deducted interest at five per cent on the \$1,000,000 mortgage and six per cent on \$850,000 preferred stock, leaving a balance of \$223,835 applicable for dividends on common stock. As all the common stock had been issued to Bartlett as the consideration for the transfer to the company of his contract to purchase the property, on which \$25,000 had been paid, and which amounted to \$1,500,000, it must have been contemplated that Bartlett was to contribute the amount of common stock which was to be distributed as a bonus to subscribers to the preferred stock.

Attention is called to the circular to show the knowledge that these defendants, appellants, had as to the object of the corporation and the nature of the statements as to expected costs, revenue, etc., which they had prepared and had authorized to be used to induce the public to subscribe to the preferred stock of this corporation. There was evidently a defect in this circular, which did not render it attractive to investors. Everything had to be purchased and it was the money of the subscribers to the stock which was to provide all of the land and the building and the equipment, and on the face of this circular it was evident that the corporation at that time had nothing as a basis upon which it could appeal to any investor to join in the enterprise. It being evident that this circular did not result in the production of the desired subscriptions, some time in July, 1906, Bartlett set to

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work to revise this circular and to make it more attractive to persons with money. It appears that during the month of July, 1906, Bartlett and the others interested were engaged in the work of preparing a new circular. That circular appears to have been transmitted to plaintiff and the statements therein contained induced him and Lehman-Charley, who was the plaintiff in the former action, to which attention has been called, to make the investments amounting to \$25,000 in the preferred stock of the corporation, and it was this circular of August 1, 1906, that we held in the Lehman-Charley action to have been fraudulent. It contained the same statements as to the cost of the property, the estimated income, which showed a large amount of surplus applicable to the payment of dividends on the common stock. It contained the names of all of these defendants, appellants, as directors, and the names of De Selding Brothers as the agents of the property, one of the latter being the defendant De Selding. It also announced that the corporation had purchased this land and contained other statements in relation to it which were false and fraudulent and upon which the plaintiff's subscription was secured.

In the trial of the Lehman-Charley action the connection of the defendants with the circular of August 1, 1906, was proved by the testimony of Bartlett and one Thompson, who was the secretary of the corporation. In that trial, although the defendants Hill, Tubby and De Selding were in court, they did not deny their share in the preparation of the circular and their knowledge of it before it was issued. On this trial substantially the same evidence was produced by the plaintiff. But this court and the Court of Appeals having decided that the circular was false and fraudulent, and that its issue rendered the defendants, who had to do with it, liable to any subscriber to the preferred stock who had subscribed in reliance upon the statements contained therein, these defendants, appellants, became witnesses. They denied that they knew

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anything of its issue, or had ever authorized its issue. The only question on this appeal is whether there was evidence to sustain a finding that they did know of this circular and the purpose for which it was issued and used prior to the time it was sent to the plaintiff.

The rule as to the liability of directors of a corporation for false and fraudulent statements issued on behalf of the corporation to secure subscriptions to its stock is not now in doubt in this State. Directors who organize a corporation of this character, knowing that attempts are being made to induce the public to subscribe to the corporation or to purchase its securities, have imposed upon them a duty that is not discharged by wilfully shutting their eyes to the acts of other officers or agents of the company as to methods used to procure money from the public. They cannot authorize the issue of circulars and other appeals to the public to secure the benefit of subscriptions to be made to the corporation, of which they are officers and directors, and not be responsible for false and fraudulent statements by which investments in its securities are secured. In this case the directors knew that circulars were being issued in the name of the corporation and upon their apparent authority to secure subscriptions to the stock of the corporation. Necessarily the standing of such a corporation depends largely upon the character of its directors and officers. Whenever a corporation issues a circular of this kind, upon the faith of which subscriptions are asked, the public receiving such circulars are entitled to presume that the circulars are issued with the assent of the officers and directors of the corporation, and that they contain a true statement of the important facts with relation to the financial condition of the corporation. The directors cannot afterwards receive subscriptions and apply the money so subscribed for the benefit of the corporation without, to some extent at least, adopting the statements contained in the circular and other representations made by the responsible officers of the corporation to secure

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such subscriptions. I think this proposition is clearly recognized by BARTLETT, J., in *Downey v. Finucane*, 205 N. Y. 251,¹ where he says, in discussing such liability: "The promoter of a company, whether he be a director or not, who knowingly issues or sanctions the circulation of a false prospectus containing untrue statements of material facts naturally tending to mislead and to induce the public to purchase its stock or other securities is unquestionably responsible to those who are injured thereby. * * * Where there are a number of such promoters all the co-adventurers are liable in damages for the fraud of an agent employed by them to effect the sale of the corporate securities without reference to their own moral guilt or innocence," and he cited with approval *Hornblower v. Crandall* (7 Mo. App. 220; aff'd, 78 Mo. 581), and continued: "'The law would be helpless if its obligations could be avoided by this convenient ignorance. Where the parties sought to be charged might have known and where it can fairly be inferred that they with the wrongdoers received the benefit of the contrivance, their ignorance cannot avail them.'"

The question, the only question, on this appeal is whether the evidence sustains the finding. Bartlett, the president of the company and the head and front of this enterprise, was examined as a witness on behalf of the plaintiff. He testified that he became acquainted with the other defendants, who are appellants, some time prior to June 1, 1906; that the defendant De Selding was acting as the agent of the company in collecting rents and received commission for so doing; that the defendant Hill furnished information regarding the cold storage building and the income to be expected therefrom; that Tubby performed the services of an architect and had full charge of all the plans of the building; that from June 6, 1906, to October 8, 1906, he saw De Selding, Tubby and Hill almost

¹ For Complaint from this case, see 2 Bradbury's Pl. & Pr. Rep. 389.

daily, in his office and sometimes in their offices, frequently more than once a week, and some of the time they were absent from the city; that the circular of August 1, 1906, was drafted prior to that date and drawn principally in the office of the company at 2 Wall street; that he worked part of the time with De Selding; that he was not certain about Hill, because he was absent; that he worked with Tubby, De Selding and his lawyer; that there were a half dozen or more drafts made; that the drafts of the proposed circular were read over at meetings of the board of directors and suggestions were made and they were then sent to the printer for a proof; that all the directors helped more or less in that work; that they all saw the circulars; that they all had copies of them; that he sent copies to Hill by mail; that this was all prior to August 1, 1906, when the circular was finally printed. De Selding did not put any money into the corporation. Tubby received some money for his services as architect and Hill received some money for his services as a cold storage expert and that money all came from subscriptions to the preferred stock. On cross-examination Bartlett was quite indefinite as to his recollection as to the connection of these defendants with the preparation of this circular, but he insisted that he had submitted this circular in suit to these defendants some time in July, 1906. He admitted that he was informed that De Selding was out of the city in July, 1906. Again, on redirect examination, he said the original prospectus—that of May, 1906—was afterwards modified by further changes, which were submitted to the directors of the company, De Selding, Tubby and Hill, in addition to himself, and that the prospectus was in all things approved by the directors. Thompson, who was afterward secretary of the company, was also examined as a witness. He testified that in all \$114,600 was received in subscriptions for the stock of the company; that of this amount \$100,000 went into the purchase of the property; that Tubby received approximately \$2,000; that Hill received about

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\$1,800. Thompson remembered seeing the circular of August 1, 1906, in the office of the company; that every time an offer was made for the sale of stock, that circular was used, and the date of the circular was changed to conform with the offer made for the sale of the stock; that he sent a great many of the circulars to his friends; that they distributed the circulars as widely as possible to secure subscriptions to stock; that De Selding, Tubby and Hill conferred with Bartlett; that after the circular was printed he delivered personally at the office of Tubby and De Selding these circulars and also mailed some to Hill, immediately upon receipt. On cross-examination Thompson said that he was not prepared to swear that De Selding was in New York in the month of July, 1906. There was also other evidence of the attendance of these defendants at the office of the company during July and August, 1906. We have further the conceded fact that there was a meeting of directors of this corporation on June 11, 1906, at which De Selding was present, and when the company was organized; and on July 16, 1906, at which Bartlett, Hill and Tubby were present; and on September 5, 1906, at which Bartlett, Tubby, Hill and De Selding were present; and on September 14, 1906, this circular was sent to the plaintiff and resulted in obtaining from him the subscription, to recover which this action is brought. We also have the evidence, which does not seem to be disputed, that during the period from August 1, 1906, to September 14, 1906, these circulars were in common use, were distributed widely to anyone from whom it was thought subscriptions could be obtained; that a copy of the circular was sent to Paris by the president of the company to obtain subscriptions in the preferred stock of the company. We then have the detailed denials of these three defendants, appellants, that they ever knew of this circular, ever authorized its publication or distribution, and ever had anything to do with any subscriptions based upon it.

The court has found that these defendants did issue these circulars. Whether or not, in any one month during the period either one of the defendants was present in New York or was present in the offices of the company when these circulars were being distributed, is more or less immaterial. The question is whether these defendants did authorize the issue of these circulars, whether with their authority or knowledge they were prepared or issued to secure subscriptions to the stock of the company from the plaintiff by the defendants. I think the evidence amply sustains the finding that the defendants knew of the issue of the circular, and that it was issued by their authority and consent, and that they were liable for any injury to the plaintiff by reason of the false statements therein contained.

These defendants, appellants, lay great stress on the fact that the trial court found, at the request of the defendants De Selding and Tubby, "that the defendant De Selding was out of town during the time said second circular was being prepared, and did not consult with Bartlett about the fresh details of the circular complained of," and "that these defendants De Selding and Tubby did not assist Bartlett in the preparation, and did not join with him in the issuing of the circular complained of." But I do not think that these findings are in any way inconsistent with the finding that defendants issued these circulars or with the further finding that they issued these circulars "with the intent that it should be distributed among the investing public for the purpose of inviting subscriptions and raising money." Therefore, I think, upon this direct finding of fact, the fact that these defendants did issue or authorize the issue of this circular was sustained by the evidence. Thus, having arrived at the conclusion that the defendants were responsible for the issue of the circular, it follows that the judgment should be affirmed, the other questions having been disposed of on the former appeal in the action by Lehman-Charley.

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The judgment is affirmed, with costs.

McLAUGHLIN and DOWLING, JJ., concurred; LAUGHLIN and HOTCHKISS, JJ., dissented.

HOTCHKISS, J. (dissenting):

It is evident from the findings and other portions of the record that the appellants were held liable as co-adventurers on the authority of *Downey v. Finucane*. I do not think the facts bring this case within the rule there applied. If appellants are liable at all, I think it must be because they actually participated in or had knowledge, actual or implied, of the use of the circular of August for the purpose of securing stock subscriptions. I construe the findings of fact made at the request of the several appellants to the contrary.

The judgment should be reversed.

LAUGHLIN, J., concurred.

Judgment affirmed, with costs.

Form No. 42

Complaint; Corporations; Fraud; False Statements in Prospectus;
Rescission of Subscription to Stock; Liability of Directors ¹

Supreme Court, New York County.

Gustave Rives, Plaintiff, against John R. Bartlett, Herman De Selding, Walter L. Hill, William B. Tubby and the Reade-Duane Cold Storage Company, Defendants.	
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The plaintiff complains of the defendants and alleges:

¹ From *Rives v. Bartlett*, 156 App. Div. 552; 141 Supp. 561. See *ante*, page 443.

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I. The defendant the Reade-Duane Cold Storage Company is a domestic corporation.

II. On or about September 14th, 1906, the individual defendants being then the directors of the defendant the Reade-Duane Cold Storage Company, prepared for general circulation, and with the intent that it should be distributed among the public, a certain prospectus or circular purporting to be issued by them and containing the following representation as to said Company:

"The Company has purchased the block of land bounded by West, Duane, Washington and Reade Streets, in the Borough of Manhattan, New York City, 270 x 70 feet, containing about 18,900 square feet. The title to the property is insured by the Title Guarantee & Trust Company of New York. * * * Net cost of land \$550,000." The circular further represented that upon this land there was to be erected a certain building, therein described, for cold storage purposes, the cost of which was estimated to be, together with incidental expenses, \$1,300,000. And it was further represented that the plan of meeting the amount that the land had cost and the amount that the building would cost, i. e., \$1,850,000, was a mortgage on the property of \$1,000,000, and sales at par of the preferred stock of the Company amounting to \$850,000. The prospectus further stated that there was offered for sale "a limited amount of the preferred stock of this Company" at par, together with a bonus of common stock. The total authorized capital of the Company was stated as \$2,500,000, of which \$1,000,000 was preferred and \$1,500,000 was common. Several of these circulars were sent by the defendant Bartlett to the plaintiff in Paris, France, enclosed in a letter from Bartlett representing that he had been "organizing the Reade-Duane Cold Storage Company;" that he enclosed copies of a circular describing "the business, its location and earning power, which you will notice is exceptionally large;" and that he offered plaintiff "the privilege to subscribe \$5,000 or

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\$10,000 or more for yourself and friends, under the conditions named in the circular letter." He asked for a reply by cable and that the cash be transferred by cable "in order to secure the large bonus offered." He further represented that "the Company is legally and well organized and everything connected with the business as stated is true, and the figures given are safe and conservative."

III. The plaintiff at the time was entirely ignorant of the true condition of the defendant Company. He believed the statements contained in said circular and said letter, hereinbefore set forth, and relied thereon. He was thereby induced to, and did, on or about October 1, 1906, transfer by cable and pay to said Bartlett \$5,000 by way of acceptance of the offer of preferred stock of the Company at par, with an equal amount of common stock as a bonus. Shortly thereafter plaintiff received what purported to be certificates of stock in the defendant Company amounting to \$5,000, par value, of preferred stock, and \$5,000, par value of common stock, both represented on their face to be full paid and non-assessable.

IV. The statements contained in said prospectus and in said letter were false and were known to the defendants to be false when they were made, and were made by the defendants with intent to deceive and to defraud whosoever might obtain a copy of said circular, or might see any such letter as Bartlett sent, by inducing such person or persons to purchase stock in the defendant Company. The Company at the time had not purchased any land at all and had not paid out any \$550,000 or any other sum for the same, and the title to its property had not been insured by the Title Guarantee & Trust Company of New York, or any other company or person. There has not been a sale of \$850,000 of preferred stock, or so much as \$100,000 of stock. What happened was that after the defendants received plaintiff's \$5,000 they purchased in the name of the defendant Company an equity of redemption in a block of land situated as stated in the circular,

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but subject to mortgages for \$454,000. The purchase was made from one Edward Roche, and the amount of the mortgages subject to which the purchase was made, was larger than the price paid for said property by said Roche. Plaintiff is ignorant as to what cash was paid for said equity of redemption. It certainly did not exceed \$105,000. Said equity of redemption is the only asset of said Company, and the only asset that the Company has ever had. It has no practical value at all, as the interest on the mortgages exceeds the income derivable from the property, and the defendant Company itself, having no other assets is not proceeding, and never has proceeded, with the project outlined in the prospectus.

V. The plaintiff has tendered the aforementioned certificates of stock to the defendants prior to the commencement of this suit, and herewith offers to return the same, which tender will be renewed at the trial of this case. Said stock is worthless.

VI. The plaintiff was deceived by the misrepresentations aforesaid and has been injured and damaged, by reason of the foregoing facts, in the sum of the \$5,000 paid out by him on or about October 1, 1906, together with interest on said sum. Said \$5,000 has, as plaintiff is informed and believes, gone into the equity of redemption aforesaid.

WHEREFORE, the plaintiff demands judgment that the Company take back the certificates of stock aforementioned and that there be returned to the plaintiff by the defendants, and that plaintiff recover of each and all of the defendants, the sum of \$5,000 with interest from October 1, 1906, and that the plaintiff have a lien upon the equity of redemption aforesaid to the amount of the money paid over by the plaintiff, with interest; and that the plaintiff have such other and further relief as may be just, together with the costs of this action.

ROBERT L. CUTTING, Attorney for Plaintiff,

No. 5 Nassau Street, Borough of Manhattan,

[Verification.]

New York City.

GERTRUDE L. MOORE, Respondent, v. HENRY G. MOORE,
Appellant

(208 N. Y. 97; aff'g 143 App. Div. 428; 128 Supp. 259)

Foreign judgment; alimony; action to collect amount granted by foreign divorce decree; construction of Code Civ. Pro., § 1772; receiver; when appointed¹

1. An action under Code Civ. Pro., § 1772, as amended in 1904, may be maintained on a judgment recovered in another State in which alimony was awarded to the plaintiff, where it appears that the defendant has avoided the payment of alimony by remaining without the State where the judgment was rendered, and in such an action it is within the power of the court to require the defendant to execute a bond, in default of which a receiver shall be appointed of a spendthrift trust, created in favor of defendant.

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 21, 1911, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Nathaniel Cohen for appellant.

Benno Loewy for respondent.

HISCOCK, J.:

In 1902, in the Court of Common Pleas in the county of Philadelphia, State of Pennsylvania, respondent recovered a judgment of separation from the appellant, her husband,

¹ For Complaint from this case, see *post*, page 464. For Decree from which the appeal was taken in this case, see *post*, page 467.

on the ground of adultery, which also awarded to her alimony at the rate of \$333.33 per month.

Both parties at the time of the commencement of said action were residents of the State of Pennsylvania, and the appellant was the beneficiary under a spendthrift trust created under the laws of that State, where also the trustee was located, and which appears to have produced about the sum of \$2,400 per month. The appellant evaded compliance with said decree and moved to the State of New York.

At the time said decree was rendered section 1772 of the Code of Civil Procedure provided: "Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, * * * (Title 1, chapter 10, relating to matrimonial actions), requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor; or to pay any sum of money which he is required to pay by an order, made as prescribed in section 1769 of this act, the court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other property, so sequestered, may be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires."

In *Lynde v. Lynde*, 162 N. Y. 405; affirmed, 181 U. S. 183, it was held that this provision was not applicable in aid of a judgment recovered upon a foreign decree of the nature of the one referred to.

In 1904, however, said section was amended by adding the words below inclosed in brackets, and thus making it read "Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, [or a judgment for divorce or separation rendered in another State, upon the ground of adultery upon which an action has been brought in this State, and judgment rendered therein] requires a husband to provide," etc.

After this amendment respondent brought this action upon her Pennsylvania decree and secured judgment, amongst other things, providing in substance that said decree be "made the judgment and order of this court;" that she recover as accrued alimony under the Pennsylvania decree and interest the sum of \$35,234.71; that the appellant pay to her the sum of \$333.33 for alimony each month and execute a bond in the penalty of \$60,000 conditioned that he would each month on receiving any monthly installment or payment of the income from the trust aforesaid pay to respondent's attorney for her the sum of \$1,400 to be applied, first, to the payment of said accruing monthly alimony and then to the payment of costs and disbursements and the payment of said accrued alimony until the latter was fully paid and thereafter pay the sum fixed for current alimony; that in case appellant should fail to make any of the payments awarded or give said bond, respondent should be entitled to further relief and the appointment of a receiver. Thereafter the appellant having failed to comply with said judgment in making payments and executing said bond, an order was made appointing a receiver "for the uses and purposes" specified, and which were, in substance, that the appellant on receipt of the income of the trust aforesaid each month should pay over the same to said receiver, indorsing the check for such payment, if in that form made, to said receiver, and that said receiver should pay to the appellant \$1,000 and apply the balance to payment of current and accrued alimony substantially as hereinbefore recited,

Opinion of the Court

and that he execute a bond in the penalty of \$60,000, conditioned for the payments and deliveries of checks as stated. It is stated without contradiction that the appellant has again changed his residence to another State, and thus far has avoided compliance with any of the provisions of said judgment.

Many objections to the judgment thus rendered are urged by the appellant. These as a whole have been so fully considered and satisfactorily answered in the opinion of Mr. Justice MILLER at the Appellate Division that it will only be necessary for us briefly to state our conclusions concerning certain aspects of the decree.

It seems to us that the judgment is clearly within the provisions of the section of the Code which has been quoted, construed in the light of, or if necessary supplemented by, the general equitable powers of the court. *Wetmore v. Wetmore*, 149 N. Y. 520, and that some of the features which are criticised either add no substantial effect to the judgment or else secure to the appellant favors to which he was not entitled.

The amendment to the Code relating to the enforcement of the decree being remedial was retroactive and applied to respondent's Pennsylvania decree, although adopted after such decree was rendered. *Laird v. Carlton*, 196 N. Y. 169.

While the provision that the Pennsylvania decree be "made the judgment of this court" is perhaps inartificial, there is no doubt concerning its effect and meaning, and it was entirely proper that the court in this action should adjudicate the amount of accrued alimony remaining unpaid and due under the Pennsylvania decree.

Under the literal wording of the Code the court had power in this action to require the appellant to pay to respondent from time to time and in such installments as it should deem proper the sums of money "required" for the support of his wife as fixed by the Pennsylvania decree and to compel him to give a bond conditioned for

such payment. While provision for the payment of a large amount of accrued alimony may be unusual, there is no doubt that the court had the power to thus decree. *Forrest v. Forrest*, 8 Bosworth, 640; affirmed, 25 N. Y. 501.

The qualification that the appellant should make these payments on receiving monthly installments of income from the trust created for his benefit limited his obligations and was a benefit to him.

It is unnecessary to discuss the question whether a receiver could be appointed of the future income to which appellant might become entitled under the trust. That was not attempted. The receiver was appointed simply "for the uses and purposes" in said judgment stated, and which were that the appellant should pay to him his said monthly installments of income, indorsing and delivering the checks therefor if such installments were thus paid, and that the moneys thus received by the receiver should be applied first to the payment of what the court had a right to find was a reasonable amount for the appellant's support and the balance substantially as already provided in the other provisions of the judgment and that an undertaking should be executed conditioned for compliance with these provisions. It thus appears that these provisions for a receiver added nothing of substance to what had already been provided for. The receiver simply became the agent through whom appellant was required to pay to his wife the amount specified from moneys or checks which had been received by him. I have no doubt that the court could thus decree. It has not attempted to interfere with the trust or exercise jurisdiction over the trustee located in Pennsylvania. It has simply pronounced its decree against the appellant over whom it secured jurisdiction by personal service within this State, and in thus doing it has confined itself to the exercise of powers which were clearly possessed by it.

The judgment should be affirmed, with costs.

Complaint

CULLEN, Ch. J., GRAY, WERNER, COLLIN and CUDE-
BACK, JJ., concur; MILLER, J., not sitting.

Judgment affirmed.

Form No. 43

Complaint; Foreign Judgment; Alimony; Action to Collect Amount
Granted by Foreign Decree; Construction of Code Civ. Pro.,
§ 1772; Receiver; when Appointed ¹

Supreme Court, New York County.

Gertrude L. Moore, Plaintiff, against Henry G. Moore, Defendant.
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The plaintiff above named, by her attorneys, Graham & L'Amoreaux, for complaint herein, alleges:

1. That on or about June 1, 1892, the plaintiff duly commenced an action in the Court of Common Pleas, No. III, for the County of Philadelphia, in the State of Pennsylvania, against the defendant, to recover a divorce from the bed and board of said defendant, which said action was brought upon the ground of adultery committed by the defendant.

2. That said Court was then and still is a Court of General Jurisdiction duly created by the laws of the State of Pennsylvania.

3. That the said action was duly and regularly begun by

¹ From *Moore v. Moore*, 208 N. Y. 97; aff'g 143 App. Div. 423; 128 Supp. 259. See *ante*, page 459. For Decree in this case, see *post*, page 467.

Complaint

the issuance of process, which was thereafter duly and regularly served upon the defendant in person.

4. That such proceedings were thereupon duly had in the said action, that on or about May 19, 1902, the plaintiff recovered a judgment or decree therein, which was duly given by such Court, whereby said Court did order, adjudge and decree, that this plaintiff be divorced and separated from bed and board with said defendant, and that he pay to her as alimony the sum of \$333.33 per month for her support, which said judgment or decree still remains in full force and effect, and not reversed, modified or otherwise vacated.

5. That there is now due and owing to the plaintiff by the defendant the sum of \$333.33, due November 19, 1902, and the sum of \$333.33, due on the 19th day of each and every month after the said November 19th, 1902, up to and including the 19th day of March, 1907, none of which has been paid.

6. That defendant has departed from the State of Pennsylvania and now is and for a long time past has been a resident in and of the City, County and State of New York.

7. That defendant has not given any security for the payment of said alimony and has left no property in the State of Pennsylvania—out of which the said judgment or decree might or could be satisfied.

8. On information and belief, that defendant receives and for a long time past has received a monthly income of upwards of eleven hundred dollars and is the owner of valuable property in the State of New York.

9. That plaintiff is and will be unable to reach any of the income or property of defendant, and will be remediless without the relief prayed for.

WHEREFORE, the plaintiff prays:

FIRST: That the judgment or decree of the Court of Common Pleas, No. III, for the County of Philadelphia, State of Pennsylvania, be made the judgment or decree

Complaint

of this Court, with the same force, effect and validity, and be enforced against the defendant by this Court, in the same manner as if said decree were the final judgment of this Court.

SECOND: That defendant be adjudged to pay plaintiff the alimony in arrears and future alimony in the sum of Three hundred and thirty-three and ³³/₁₀₀ dollars (\$333.33) a month.

THIRD: That defendant be required to give security for the payment of said future alimony.

FOURTH: That defendant's personal property, and the rents and profits of his real property be sequestered and a receiver thereof appointed.

FIFTH: That defendant be enjoined from disposing of any of his said property, real or personal, unless and until he pay the alimony in arrears and give such security for the payment of future alimony as the Court may decree herein.

SIXTH: That plaintiff have such other and further relief as to the Court may seem proper, together with the costs of this action.

GRAHAM & L'AMOREAUX,
Attorneys for Plaintiff,
42 Broadway,
New York City.

[Verification.]

Judgment

Form No. 44

Judgment; Foreign Judgment; Alimony; Action to Collect Amount
Granted by Foreign Divorce Decree; Construction of Code of
Civ. Pro., § 1772; Receiver; when Appointed¹

At a Special Term, Part VI
of the Supreme Court of the
State of New York, held in and
for the County of New York,
at the County Court House in
the Borough of Manhattan, in
the City of New York, on this
29 day of March, 1910.

Present—Honorable James A. O'Gorman, Justice.

Gertrude L. Moore, Plaintiff, against Henry G. Moore, Defendant.	}
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The issues raised by the pleadings having duly come on to be tried by this Court, and the Court having duly tried the same and heard Benno Loewy, of counsel for plaintiff on her behalf, and Hon. John B. Stanchfield, of counsel for the defendant, on his behalf, and due deliberation having been had by the Court, and the Court's findings of fact and conclusions of law having been duly signed and filed, now on motion of Benno Loewy, attorney for the plaintiff, be it and it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff have judgment against the defendant, upon the issues raised by the pleadings herein, with costs to be taxed,

¹ From *Moore v. Moore*, 208 N. Y. 97; aff'g 143 App. Div. 428; 128 Supp. 259. See *ante*, page 459. For complaint in this case, see *ante*, page 464.

Judgment

and an extra allowance of counsel fees of Five hundred dollars; and on the like motion it is hereby further

ORDERED, ADJUDGED AND DECREED, that the judgment and decree of the Court of Common Pleas, Number 3, for the County of Philadelphia, rendered on the 19th day of May, 1902, in favor of the plaintiff and against the defendant herein and ordering, adjudging and decreeing that Gertrude L. Moore, the libellant, is hereby divorced from the bed and board of the said Henry G. Moore, respondent, and fixing the plaintiff's alimony at \$333.33 per month, and directing said respondent Henry G. Moore to pay to said libellant Gertrude L. Moore, the sum of Three hundred and thirty-three dollars and thirty-three cents per month alimony, be and the same is hereby made the judgment and decree of this Court; and upon the like motion, be it and it is hereby further

ORDERED, ADJUDGED AND DECREED, that the plaintiff have and recover as back alimony due her from November 19th, 1902, to January 19, 1910, the day of the trial of this cause, being eighty-seven months, the sum of twenty-eight thousand, nine hundred and ninety-nine dollars and seventy-one cents, as principal, together with the sum of six thousand, two hundred and thirty-five dollars, legal interest upon the several monthly installments to said date, amounting together, on said nineteenth day of January, 1910, to the sum of Thirty-five thousand, two hundred and thirty-four dollars and seventy-one cents, with interest thereon from said 19th day of January, 1910.

And on the like motion, be it and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant pay to the plaintiff, on the 19th day in each month, alimony at and after the rate of Three hundred and thirty-three dollars and thirty-three cents (\$333.33) per month, from and after the said 19th day of January, 1910, with interest on each installment as the same accrues, to the date of payment.

And on the like motion, be it and it is hereby further

Judgment

ORDERED, ADJUDGED AND DECREED, that the defendant, within ten days after the entry of this judgment and decree, do make, execute, acknowledge and file in the office of the Clerk of this Court, a bond, to the plaintiff, in the penalty of Sixty thousand dollars, with at least two good and sufficient sureties, or at his election, by a Surety Company to be approved by this Court, conditioned that he will comply with the terms of this order, judgment and decree, in manner and form as hereby provided, and with any and all further orders, judgments and decrees that may be made herein.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that immediately on receiving any monthly instalment or payment of, or check for, any income from the estate of his father, Andrew M. Moore, late of the City of Philadelphia, in the State of Pennsylvania, deceased, or from the executors of, or trustees under the last will and testament of said Andrew M. Moore, deceased, he immediately pay over to the plaintiff, at the office of Benno Loewy, her attorney, in the City of New York, during her natural life, the sum of Fourteen hundred dollars per month to be applied as follows: Three hundred and thirty-three dollars and thirty-three cents (\$333.33) as the monthly instalment of alimony hereby, and by the judgment of the Court of Common Pleas, No. 3, for the County of Philadelphia, awarded to her as current alimony; Eight hundred and twenty-nine ⁵⁵/₁₀₀ dollars (\$829.55), costs and disbursements, as taxed and hereby awarded to the plaintiff herein, and the balance toward the payment of the sum of Thirty-five thousand, two hundred and thirty-four dollars and seventy-one cents, back alimony, with interest thereon from January 19, 1910, Three hundred and thirty-three dollars and thirty-three cents (\$333.33) alimony due February 19, 1910, with interest from said day, and Three hundred and thirty-three dollars and thirty-three cents (\$333.33) alimony due March 19, 1910, with interest from said day,

Judgment

hereby found due and owing from defendant to plaintiff herein, and hereby adjudged and awarded to her, until said several sums and interest are fully paid, and after said costs, disbursements and back alimony are fully paid, that thereafter the defendant pay to the plaintiff the said sum of Three hundred and thirty-three dollars and thirty-three cents (\$333.33) monthly, immediately upon receiving his income aforesaid, during the natural life of the plaintiff. And if the defendant shall, within the time hereby limited, fail to make any of the payments hereby awarded, or give the bond and security hereby, by him ordered and adjudged to be given, that then and upon proof of such default, the plaintiff shall be entitled to a further order at the foot of this judgment, and as a part thereof, appointing John J. Delany, Esq., of the City of New York, receiver herein, directing that the defendant immediately on receiving any instalment of or payment upon or out of his share of the income of the estate of his father, Andrew M. Moore, late of the City of Philadelphia, deceased, immediately pay over the same to said receiver, and if any such payment is, or payments are made to him by check, that he immediately deliver said check, duly endorsed by him, to said receiver; that said receiver apply all such payments so received by him, as follows:

FIRST: That he pay to the defendant for his maintenance and support the sum of One thousand dollars monthly, which sum is hereby duly adjudged to be sufficient and proper for that purpose, the defendant having no one else who has a legal claim upon him for his support except the plaintiff herein.

SECOND: That he pay to the plaintiff the sum of Three hundred and thirty-three dollars and thirty-three (\$333.33) cents per month, as and for her current alimony.

THIRD: That he apply the balance to the payment of the costs, disbursements and allowances herein as taxed at the sum of Eight hundred and twenty-nine dollars (829) and fifty-five (55) cents, which are hereby

Judgment

awarded the plaintiff and then that he apply the balance towards the payment of the back alimony hereby adjudged to be due and to grow due to the plaintiff herein, until all arrears of alimony are fully paid with interest, deducting each month his lawful fees for receiving and paying out such moneys, and when all such arrears of alimony are fully paid, with interest, that then and thereafter said receiver shall first pay to the plaintiff the sum of Three hundred and thirty-three dollars and thirty-three cents (\$333.33) as and for her current alimony and the balance, less his lawful fees as such receiver shall be immediately repaid to the defendant herein.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that said receiver, before he enters upon the discharge of his duties as such, make, execute, acknowledge and file in the office of the Clerk of this Court, a bond, in the penalty of Twenty thousand dollars, conditioned for the faithful performance of his duties as such, in due form of law, and which shall be approved by one of the Justices of this Court.

AND IT IS HEREBY FURTHER ORDERED AND ADJUDGED, that if such receivership become effective as hereby provided, the defendant within ten days after the entry of the order making such receivership effective and appointing such receiver, make, execute, acknowledge, deliver and file in the office of the Clerk of the County of New York, a bond to the plaintiff in the penalty of Sixty thousand dollars, conditioned that he will make the payments and deliveries of the checks duly endorsed by him, to said receiver, in manner and form as hereby adjudged, ordered and provided.

J. A. O'GORMAN,
J. S. C.

Wm. F. Schneider,
Clerk.
(Seal)

JOSEPH F. McWILLIAMS, FRANCIS J. McWILLIAMS,
GEORGE H. McWILLIAMS, HANNAH McWILLIAMS, and
JENNIE McWILLIAMS, Plaintiffs, v. ELIZABETH T.
MORRIN, Defendant

(Supreme Court, Kings County Special Term, September 24, 1913)

Pleadings; reply; denial of knowledge or information sufficient to form a belief as to "material" allegations; motion for judgment on the pleadings

1. A reply in which the plaintiff denies any knowledge or information sufficient to form a belief as to all the "material" allegations in the answer is evasive and is not permissible.

Motion for judgment on an answer on the ground that the reply is frivolous.

Granted.

A. G. Vanderpool, attorney for plaintiffs.

Cornelius C. Beekman, attorney for defendant.

KELLY, J.:

The plaintiff having been ordered to reply to the answer, serves a reply which denies knowledge or information sufficient to form a belief as to the "material" allegations of fact or law contained in the answer, and the defendant moves for judgment, alleging that the reply is frivolous. The denial of all the "material" allegations in a pleading is evasive and is not permissible. The opinion of Mr. Justice GIEGERICH in *New York Coach & Lamp Co. v. Brown*, 143 N. Y. Supp. 100, gives the reason and cites some of the numerous authorities for the rule. The motion for judgment will be granted unless the plaintiff within ten days serves an amended reply and pays the defendant \$10 costs.

BERNARD-GREENWOOD CO., Plaintiff, v. WILLIAM HENKEL, JR., as Trustee in Bankruptcy of ROBERT C. VERNES, Bankrupt, and others.

(Supreme Court, Kings County Special Term, September 20, 1913)

Mechanic's lien; bankruptcy; forfeiture of lien by filing claim against bankrupt contractor

1. A person who files a mechanic's lien against a contractor does not forfeit the lien as against such contractor by filing proof of claim with a trustee in bankruptcy; he may foreclose his lien and claim from the bankrupt estate any deficiency which may arise upon such foreclosure.¹

Motion for judgment on the pleadings after defendant demurred to the complaint.

Demurrer overruled and defendant permitted to answer.

Wayland & Bernard, attorneys for plaintiff.

¹ The allegation in the complaint upon which the defendant founded his demurrer was as follows:

"FOURTEENTH: No action or proceeding has been had at law or otherwise, and no other action has been brought for the recovery of the said sum of \$338.41 and interest hereinbefore alleged to be due plaintiff, except that plaintiff on June 24, 1913, filed a verified proof of claim against Robert C. Vernes, bankrupt, with the Referee in Bankruptcy duly appointed in the proceeding then and now pending in the District Court of the United States for the Eastern District of New York, entitled 'In the Matter of Robert C. Vernes, Bankrupt, In Bankruptcy, 1913-5319'. That in such proof of claim plaintiff alleged among other things the filing by it of the notice of lien hereinbefore specifically alleged. That no dividend has been declared or paid plaintiff on its said claim against said bankrupt."

The defendant did not avail himself of the privilege of withdrawing his demurrer and answering and final judgment was entered in favor of the plaintiff in Kings County on October 1, 1913.

Morris Kamber, attorney for defendant William Henkel, Jr., as trustee, etc.

KELLY, J.:

The question presented is whether the plaintiff, seeking to foreclose its mechanic's lien, has forfeited its right to enforce the lien by filing a proof of claim against the bankrupt contractor. The complaint alleging, as required by law, that no other proceeding has been brought for the recovery of the sum due, qualifies the allegation by the statement that a proof of claim has been filed with the referee in bankruptcy, but that in such proof of claim the existence of the mechanic's lien was also averred and that nothing has been paid on account. The trustee in bankruptcy of the insolvent contractor demurs to the complaint, claiming that it does not state facts sufficient to constitute a cause of action. The plaintiff moves for judgment on the pleadings. The Bankruptcy Act clearly contemplates the filing of claims by creditors who hold security for the debt and, unless the security is surrendered, the claim is good only for such amount as may be due over and above the value of the security. In this case the plaintiff did not surrender the security, and the legal effect of filing the claim is simply to enable him to assert a demand for any deficiency which may exist after foreclosure of the lien. Therefore there is nothing in the Bankruptcy Act which invalidated the lien because the claim was filed. Nor is there any provision in the State Lien Law which would bring about this result. It cannot be claimed that the plaintiff has "elected" to abandon his lien, because he expressly asserts it in the claim filed, and the result is that, having filed his lien and commenced his action to foreclose it, he wishes to save his right to demand payment of the deficiency if there is a deficiency after the termination of the suit to foreclose the lien. The plaintiff's motion for judgment on the pleadings will therefore be granted unless the defendant trustee within

Opinion of the Court

five days withdraws the demurrer and serves an answer, paying \$10 costs to plaintiff.

MARY F. AMADEO, by her Guardian *ad litem*, ANTONETTA CRESCUOLO, Plaintiff, v. LOUIS AMADEO, Defendant

(Supreme Court, Kings County Special Term, October 4, 1913)

Annulment of marriage; form of decree

1. A decree for the annulment of the marriage of the plaintiff because she was under the age of legal consent should not recite that the marriage was annulled because of the "non-age" of the plaintiff, because "non-age" means under twenty-one years of age; whereas, the grounds for annulment specified in the statute must be that the plaintiff is under the age of legal consent, which is eighteen years.

Settlement of decree in action to annul marriage.

Harry S. Lucia, attorney for plaintiff.

BENEDICT, J.:

The interlocutory judgment is not in proper form, for it provides for the annulment of the marriage because of the "non-age" of the plaintiff. "Non-age" means under 21 years of age, whereas to furnish a ground for annulment the plaintiff must have been at the time of the marriage under the age of legal consent, 18 years. The interlocutory judgment should therefore be amended before final judgment is entered so as to state the ground for the annulment to be that the plaintiff was at the time of the contraction of the marriage under the age of legal consent.

MORRIS EDELMAN *et al.*, Plaintiffs, v. LEON LEMBERG,
Defendant

(Supreme Court, Kings County Special Term, September 24, 1913)

Injunction; damages; reference; dismissal of complaint for failure
of plaintiff to perform

1. Where in an action for the specific performance of a contract the plaintiff secures an injunction and then recovers judgment in the action, which judgment is made conditional upon the plaintiff performing his part of the contract, and for failure of the plaintiff to perform the complaint is subsequently dismissed, the defendant has a right to recover damages on the undertaking given when the injunction order was made and to have such damages assessed by a reference under Code Civ. Pro., § 623, notwithstanding, technically, judgment was rendered in favor of the plaintiff in the action.¹

Motion for a reference to determine the amount of damages occasioned by an injunction order, under Code Civ. Pro., § 623.

Granted.

Boudin & Liebman, attorney for plaintiffs.

A. Wolodarsky, attorney for defendant.

KELLY, J.:

The right of defendant to have the damage caused by the undertaking on injunction ascertained appears to be unquestionable (§ 623, C. C. P.). I do not pass upon the question whether they sustained damage or the amount thereof. Plaintiff's claim that they recovered judgment in the action and are therefore relieved from liability is

¹ No appeal was taken from the order entered in this case.

Statement of the Case

untenable. They profess willingness to comply with the contract which they sought to enforce, and the judgment granted specific performance, but when the time came the plaintiffs failed in performance and the complaint was dismissed. This was the provision of the judgment before Justice MAREAN. When the final judgment was entered I think the right of defendants to damages became fixed under the terms of the undertaking. They had no right to the injunction, because they were the parties who broke the agreement. Motion granted. Settle order on notice.

UNA GOSLIN, Respondent, *v.* ANNIE I. MAGHER, Appellant ¹

(207 N. Y. 716; aff'g without opinion 141 App. Div. 926; 125 Supp. 1122, no opinion)

Alienation of affections; action by wife against woman who induced her husband to desert her

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 12, 1910, affirming a judgment in favor of plaintiff entered upon a verdict.

Irving L. Ernst for appellant.

Edwin T. Taliaferro for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, HISCOCK, COLLIN, CUDDEBACK and MILLER, JJ. Absent: WERNER, J.

¹ For Complaint from this case, see *post*, page 478. For Bill of Particulars, see *post*, page 480. For Charge of Trial Judge, *post*, page 485.

Form No. 45

**Complaint; Alienation of Affections; Action by Wife against Woman
who Induced her Husband to Desert her ¹**

Supreme Court, New York County.

Una Goslin, Plaintiff, against Annie Irene Magher, Defendant.	}
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The complaint of the plaintiff respectfully shows to the Court and the plaintiff alleges:

I. That the plaintiff is now and for more than eleven years last past has been the wife of Alfred R. Goslin.

II. That up to about the middle of the year 1903 the plaintiff was living, cohabiting with and being supported by her said husband at the Borough of Manhattan, City of New York, and was living with him happily as his wedded wife, and as such enjoying his affection, support, protection, and consort; that at said time the defendant, well knowing the premises and wrongfully intending to injure the plaintiff and deprive her of her said husband's protection, society, aid and support, wilfully, wickedly and maliciously gained the affections of the said Alfred R. Goslin and induced him to have carnal intercourse with her and sought to and did persuade him and entice him by offers and tenders and demonstrations of affection and carnal love and cohabitation and otherwise to leave the plaintiff without support and without consorting and co-

¹ From *Goslin v. Magher*, 207 N. Y. 716; aff'd without opinion 141 App. Div. 926; 125 Supp. 1122, no opinion. See *ante*, page 477. For Bill of Particulars, see *post*, page 480. For Charge of Trial Judge, *post*, page 485.

Complaint

habiting with her and to go with the defendant to divers places other than that theretofore occupied by the plaintiff and her husband as their home.

III. That thereafter and at various times between the time aforesaid and the commencement of this action the defendant continued her unlawful and wrongful intercourse with the said Alfred R. Goslin and induced and wilfully and maliciously enticed the said Alfred R. Goslin to desert the plaintiff and to leave her without means of support or protection and to go with her to various places in the United States and Europe, and the defendant has ever since harbored and detained the said Alfred R. Goslin against the will of the plaintiff and wilfully and maliciously debauched him.

IV. That by reason of the premises, the said Alfred R. Goslin has become estranged from plaintiff, and his affections and regard for plaintiff have been destroyed; that thereby plaintiff has been and still is wrongfully deprived by the defendant of the comfort, society, support and protection of her said husband, and the happiness and benefits she otherwise would have received at his hands, and has suffered great distress of mind and body to her damage in the sum of Fifty thousand dollars and over.

WHEREFORE plaintiff demands judgment against the defendant for the sum of Fifty thousand dollars and the costs of this action.

M. HALLHEIMER,
Plaintiff's Attorney,
563 Broadway,
Boro. B'klyn,
New York City.

[*Verification.*]

Bill of Particulars

Form No. 46

Bill of Particulars; Alienation of Affections; Action by Wife against
Woman who Induced her Husband to Desert her ¹

Supreme Court, New York County.

Una Goslin, Plaintiff, against Annie Irene Magher, Defendant.	}
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WHEREAS the defendant has made a motion that the plaintiff serve upon the defendant a bill of particulars showing, among others, as hereinafter referred to; and

WHEREAS an order has been granted that the plaintiff serve a bill of particulars showing in detail the dates and circumstances of the alleged alienation by the defendant of the affections of plaintiff's husband; and

WHEREAS from the nature of the action the knowledge of the facts upon which the plaintiff's claim rests is more with the defendant than with the plaintiff, and the opportunity to obtain a discovery from the defendant has not been offered by her and is practically unobtainable, the defendant being now absent, as the plaintiff is informed and believes, and in Paris and France and is not very apt to comply with a request to state the details of how she did it, how often, when and where and the mannerisms and loving looks, sweet words, embraces and endearments used by her which are more in her knowledge certainly, and as the plaintiff's husband, the plaintiff is informed

¹ From *Goslin v. Magher*, 207 N. Y. 716; aff'g without opinion 141 App. Div. 926; 125 Supp. 1122, no opinion. See *ante*, page 477. For Complaint in this case, see *ante*, page 478. For Charge of Trial Judge, see *post*, page 485.

Bill of Particulars

and believes, is now with the defendant in Paris and is as unlikely to make a statement regarding said matters, the plaintiff with the assistance of her attorney, in order to comply with the order of the Court, states and alleges on her information and belief in detail the circumstances of the alleged alienation by the defendant of the affections of plaintiff's husband so far as she is able to do, to wit:

FIRST

(a) How she did it.

Annie Irene Magher, the defendant, looked at the plaintiff's husband longingly, lovingly, sweetly and invitingly and by looks and motions and by what she did say and speak, by words and with her eyes and manner and motion of the body and parts thereof, she challenged plaintiff's husband's love, affection, affectionate embraces and sexual intercourse; the exact words used by the defendant the plaintiff is unable to state, not having listened to their conversations and witnessed their embraces as neither the defendant nor her husband invited her to be present or attended to such loving intercourse and matters of affection in her presence.

(b) How else she did it.

She caused plaintiff's husband to take supper with her at various hotels and other places and to invite her to wine suppers during which and on which occasions she threw fiery, longing and loving looks at him and used all the wiles and lover's arts and modes of endearment so as to cause him to love her, have sexual relations with her and to consider her the *non plus ultra* of a woman and her womanly charms and her capacity to impart pleasures superior to that of any woman and especially to that of the plaintiff, and that she regarded him as possessed of all the qualities she admired and adored in man, as an "Adonis."

(c) She induced him to take her out automobile riding and during such rides nestled up lovingly to his side and

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for her arms around him and talked lovingly and endearingly to him.

(f) She caused him to visit hotels with her, stop at hotels with her, to stop over night in hotels with her and to sleep in the same bed with her.

She caused him to live with her as man and wife under assumed names in lodgings, apartments and hotels and lived with him in sexual relations as if she was his wife.

(g) On a large number of occasions when the plaintiff's husband was about to leave her and return home to plaintiff she begged of him to stay with her and not return to his home and in order to induce him not to return home to his wife used loving and endearing words and even used tears to detain, restrain and prevent him from returning to his wife and marital duties.

(h) She induced him to take her travelling and travelled with him to various places and cities.

(i) She followed him practically constantly and went to the places where he was.

(j) She wrote him love letters containing expressions of affection and of longing and of the hope of soon seeing him again and containing words of promise and indicative of the affection she had for him and of the enjoyments in store for him when alone with her and continuing their said relations and similar and other like expressions, promises and inducements.

(k) She caused him to make to her and accepted from him presents of clothing, jewelry and finery of various kinds, and to further cement their relations caused him to support her and live with her in great style and with all the adjuncts of loving enjoyment.

(l) She slept with him, she ate with him, and drank with him and travelled with him; she smiled at him, she hugged him, she pushed him, she kissed him, she looked at him, she winked at him and she admired or pretended to admire him and looked at him admiringly; she looked at

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him challengingly and challenged him to love her and embrace her; she told him that she loved him, she told him that she admired him and promised to do anything in the world for him if he only stayed with her and the like more, ministering to the plaintiff's husband's comforts or whims as only a woman can or will and so continued and is ministering still.

SECOND

Where she did it.

In the City of New York, in various places on Long Island, in various places in the State of New York, in various places in other States of the Union, in the City of London, England; in the City of Paris, France, and elsewhere; but the exact house or houses in Paris and the exact places elsewhere the plaintiff cannot specify as she has no personal knowledge concerning the same.

THIRD

When she did.

Practically each and every day and night from the day of 1901, to the present day, excepting only short temporary absences of the plaintiff's husband and a period of time during which time plaintiff's husband was deprived of his liberty by a judgment of the Court and a period of about a month or two, being the difference between the time when the plaintiff's husband left for France and the time it took the defendant to follow him thereto, being a very short period of time, but the exact number of days the plaintiff cannot state, to the best of her knowledge it did not exceed a period of three months at the utmost.

FOURTH

How further she did it.

The defendant asked of plaintiff's husband to leave

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his wife and marry her and not to return to his wife and she induced him to comply with her request; and furthermore, the defendant demanded of plaintiff's husband to discontinue his marital relations with the plaintiff and he complied with her request; the exact words, however, which the defendant used and the various conversations and other details are unknown to the plaintiff and cannot be known to her in the nature of things.

FIFTH

The plaintiff, accompanied by her youngest daughter, the child of herself and husband, the said Alfred Goslin, having on two occasions observed the defendant throwing loving looks and looks of a secret understanding at her husband, informed the defendant that she was the wife of Alfred R. Goslin and was married and had children and asked her not to make as free with her husband and to leave her husband alone because he was a married man, but her request was of no avail and she was also informed that while she was away, sent by her husband to Europe, the defendant slept in her own house at No. 677 West End Avenue, New York, and in her own bed with the plaintiff's husband, this between the 1st day of May, 1904, and the day of September, 1904.

The plaintiff, obedient to the order of the Court, has in this bill of particulars, assisted as aforesaid, to the best of her ability, given in detail the dates and circumstances of the alienation by the defendant of the affections of her, the plaintiff's husband. She does not pretend that she did or can give all the details, for that in the nature of things is impossible to her, and she regrets that in order to protect and preserve her rights and not to be prevented from giving evidence of the alienation by the defendant of her, the plaintiff's husband's affection, she was compelled to make a statement of details as aforesaid which

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under no other circumstances she could be induced to make or sign.

Dated, November 18th, 1908.

M. HALLHEIMER,
Plaintiff's Attorney,
774 Broadway,
Bor. Brooklyn,
New York City.

To

MESSRS. OLCOTT, GRUBER, BONYNGE & McMANUS,
Defendant's Attorneys,
170 Broadway, New York.

[*Verification.*]

CHARGE ¹

JOHN J. BRADY, J.

Gentlemen of the Jury: This action is brought to recover damages for the alleged alienation of affections of the plaintiff's husband by the defendant. The basis of such an action is loss of consortium, that is of the company and companionship which should exist between husband and wife. A wife cannot recover damages against another woman merely because such woman had carnal intercourse with the husband, but a married woman may recover damages from another woman for enticing away her husband and depriving her of his comfort, aid, protection and support. It is necessary, however, for the wife in such action to show some active interference on the part of the other woman. Mere passive acceptance of a married man's sexual attention is not enough. In the case of a common prostitute for instance dealing with a married man on a pecuniary basis, it could not be charged that she enticed or alienated the man away. It

¹ From *Goslin v. Magher*, 207 N. Y. 716; aff'g without opinion 141 App. Div. 926; 125 Supp. 1122; no opinion. See *ante*, page 477. For Complaint from this case, see *ante*, page 478. For Bill of Particulars, see *ante*, page 480.

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might even be that without pecuniary inducement sexual intimacy of a woman with a married man would not make her liable to the wife for damages, but if it appears that the desire for carnal attention and love and society of a married man and for the purpose of attaining that end, either by word or act, alienates the husband's love and affection from the wife and wins them to herself, she is liable to the wife in an action for damages.

You will carefully weigh the evidence submitted to you in this case and determine whether the plaintiff has satisfied you by a preponderance of evidence that the defendant wilfully and knowingly alienated to herself the affections of the plaintiff's husband. If you feel that she has then you may award her a verdict for such sum as you deem just compensation, not exceeding the sum claimed by the complaint.

In reaching a conclusion you must be governed only by the evidence. You must not guess or conjecture or speculate but must analyze the testimony as business men of experience with the world. Have you any requests?

Mr. Ernst: I ask your Honor to charge there must be some evidence which leads to the conclusion that the defendant is the direct cause of the abandonment which is inconsistent with the conclusion that such abandonment resulted solely from the will and wishes of the husband. And they must find that the plaintiff's husband abandoned her by reason of the inducements or allurements of the defendant. If they can find from the evidence that he voluntarily had intercourse with her they must find a verdict for the defendant.

The Court: I refuse to charge other than I have already charged on that point. I have charged that there must be some evidence which shows some active interference on the part of the defendant in luring or inducing the love and affection of the husband to herself and his abandonment of his wife.

Mr. Ernst: I except to your Honor's refusal to the

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charge as requested and I ask your Honor to make the usual charge in relation to the preponderance of evidence. If the evidence is equally balanced their verdict must be for the defendant.

The Court: I so charge. I refuse plaintiff's requests except as already charged.

Mr. Hallheimer: I thank you. There is only one and that is she can only recover once for all her injuries, past, present and future.

The Court: I charge that.

Mr. Ernst: I ask your Honor to charge if the jury finds from the testimony of plaintiff herself given in the affidavit in the case of Goslin against Goslin, as the reason that the plaintiff's husband abandoned her, was by reason of the criminal prosecution and by reason of the fact he became a fugitive from justice, they must find for the defendant.

The Court: I so charge.

Mr. Hallheimer: I ask your Honor to charge that the proof of his prosecution subdated the commencement of the illicit relations between Mr. Goslin and Miss Magher about three years. The proof is here this matter happened in 1906.

The Court: The dates and the evidence are as fresh in the minds of the jury as they are in mine and they will recall that for themselves. After the husband left for Paris he never returned.

Mr. Hallheimer: Those are in 1906 and he left for Paris and the relations between Miss Magher and Mr. Goslin were in 1902, 1903, 1904 and so on.

The Court: That is all in the evidence before the jury. Gentlemen, you may retire.

Jury retired and a sealed verdict ordered.

New York, Tuesday, January 12th, 1909.

Jury returned with a verdict in favor of the plaintiff for \$50,000.

CLARKE DOOLEY, Respondent, v. PATRICK H. McNULTY,
Appellant ¹

(207 N. Y. 718; aff'g without opinion 145 App. Div. 943; 130 Supp.
1109, no opinion)

**Brokers; action for commission in securing a mortgage loan on real
property**

Appeal from a judgment of the Appellate Division of
the Supreme Court in the Second Judicial Department,
entered July 5, 1911, affirming a judgment in favor of
plaintiff entered upon a verdict in an action to recover
for services alleged to have been performed in procuring
a loan for the defendant.

Denis O'L. Cohalan for appellant.

Wilmot L. Morehouse for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, WERNER, HISCOCK,
COLLIN, CUDDEBACK and MILLER, JJ.

¹ For Complaint from this case, see *post*, page 489. For Charge of
Trial Judge, see *post*, page 491.

Complaint

Form No. 47

**Complaint; Brokers; Action for Commission in Securing Mortgage
Loan on Real Property ¹**

Supreme Court, Kings County.

Clarke Dooley,	}
Plaintiff,	
against	
Patrick H. McNulty,	
Defendant.	

The plaintiff in the above-entitled action, by Wilmot L. Morehouse, his attorney, complaining of the defendant, alleges:

I. That at all the times hereinafter mentioned, the plaintiff was and now is a resident of the Borough of Brooklyn, County of Kings, City and State of New York.

II. That on or about February 17th, 1909, the defendant in the above-entitled action engaged the plaintiff, a real estate broker, to procure for him a loan on premises between One Hundred and Eighty-second and One Hundred and Eighty-third Streets on the west side of Broadway, in the City, County and State of New York, owned by the defendant, for sixty-seven thousand five hundred dollars (\$67,500) at five per cent (5%) per annum; and the plaintiff agreed to use his efforts in procuring said loan.

III. That on several occasions between February 17th, 1909, and March 6th, 1909, the plaintiff, in pursuance of said agreement, made various efforts to procure the said loan, and on said last-mentioned date, March 6th, 1909, procured from said defendant a written authorization for the procuring of a mortgage on said property at

¹ From *Dooley v. McNulty*, 207 N. Y. 718; aff'g without opinion 145 App. Div. 943; 130 Supp. 1109; see *ante*, page 488. For Charge of Trial Judge, see *post*, page 491.

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the reduced amount of sixty thousand dollars (\$60,000); plaintiff having at that time procured from a certain institution an offer of sixty thousand dollars (\$60,000) at five per cent (5%), subject to the approval of the Committee of said institution; the said written authorization of March 6th, 1909, also contained an authorization to place the mortgage at sixty-five thousand dollars (\$65,000) or sixty-seven thousand five hundred dollars (\$67,500) at five per cent (5%) on the same property, the expense to said McNulty not to exceed one thousand dollars (\$1,000).

IV. That on March 17th, 1909, the said Committee of said institution passed favorably upon the application for the loan of sixty thousand dollars (\$60,000) at five per cent (5%) in accordance with the terms of said written authorization and plaintiff so informed the defendant forthwith.

V. That between said February 17th and March 16th, 1909, plaintiff had made various overtures with one James M. Horton for the procuring of said loan of sixty-seven thousand five hundred dollars (\$67,500.00).

VI. On information and belief, that on or about March 13th, 1909, the said James M. Horton went to the defendant direct, Patrick H. McNulty, without the knowledge or consent of the plaintiff, and arranged with the defendant for the placing of the said loan of sixty-seven thousand five hundred dollars (\$67,500.00).

VII. That on March 17th, 1909, plaintiff received from defendant a letter purporting to cancel the said authorization of March 6th, 1909, for the procurement of said loan on the ground that he had made arrangements with other parties on March 16th; and that, on information and belief, said other parties referred to in said letter received March 17th, 1909, was said James M. Horton, the person referred to by the plaintiff as the Horton to whom he had offered said loan.

VIII. That the procurement of such loan was brought

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about by the efforts of the plaintiff, and that under the aforesaid agreement of authorization, the plaintiff is entitled to the one thousand dollars (\$1,000.00) therein specified, as and for his reasonable commission, and reasonable and customary value for such services.

That heretofore and on the 5th day of January, 1910, by an order of this Court, duly entered on said date, the plaintiff was granted leave to prosecute this action as a poor person.

WHEREFORE, plaintiff demands judgment against the defendant for one thousand dollars (\$1,000.00), with interest from the 17th day of March, 1909, together with the costs of this action.

WILMOT L. MOREHOUSE,
Attorney for Plaintiff,
No. 26 Court Street,
Brooklyn, N. Y.

[*Verification.*]

CHARGE ¹

ASPINALL, J.:

Gentlemen of the Jury: You are called upon to decide this controversy between Clarke Dooley, the plaintiff, and Patrick H. McNulty, the defendant. It is not a difficult case, I should imagine, for twelve business men to decide. The law is very simple. The only difficulty will be to reconcile the conflicting statements of the plaintiff and defendant with respect to the negotiation of this loan.

You are here to assist the Court in the administration of justice. You twelve men have been called from your daily labors and sworn as jurors to pass upon disputed questions of fact, not only in this case but in every case

¹ From *Dooley v. McNulty*, 207 N. Y. 718; aff'g without opinion, 145 App. Div. 943; 130 Supp. 1109 (no opinion). See *ante*, page 488. For Complaint see *ante*, page 489.

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which may be called to your attention during the week of your service. If there were no disputed facts in this case, you would not be needed. If there were only questions of law involved, the case would be decided by the Justice who presides. But in all cases where the facts are in dispute, the law has wisely provided that the same shall be submitted to twelve business men, strangers to each other, who come into court and meet here for the first time and use their every day business experience in passing upon the disputed questions of fact. So as to the facts in this case you are the sole and exclusive judges. The law you must receive from the Court and apply to the facts testified to in your hearing.

This plaintiff, having brought the defendant into Court, the burden of proof has wisely been placed upon him; and he must sustain his claim before you twelve men by legal, credible, believable evidence. The burden is upon him. If he does not sustain this burden, then your verdict must be in favor of the defendant.

Further, the plaintiff must sustain his claim by what is known in law as a fair preponderance of evidence. After you have discussed the evidence in its entirety, if you believe that the plaintiff has substantiated his claim by a fair preponderance of evidence, then he will be entitled to a verdict. If he has not, that is, if the evidence does not preponderate in his favor, then your verdict must be for the defendant.

If, after you have discussed the evidence in its entirety, you are unable to decide whether the evidence does or does not preponderate in favor of the plaintiff, then and in that event your verdict must be for the defendant.

The plaintiff's claim is very simple. Briefly stated, it is this: Mr. Dooley claims that in the early part of the year 1909, he called upon Mr. McNulty with respect to securing a building loan on some property that the defendant owned in the upper part of Broadway, in the Borough of Manhattan or the Bronx. The plaintiff,

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however, says that at that time Mr. McNulty was not prepared to erect buildings upon this property, and that the negotiations fell through; but that, subsequently, and on or about February, 1909, the proposition was advanced by the plaintiff to Mr. McNulty to secure what is called "a straight loan" upon this property on Broadway between 182nd and 183rd Streets, in the Borough of Manhattan; and that Mr. McNulty acquiesced; and that Mr. McNulty, in substance, said to this plaintiff, Mr. Dooley, "If you can procure a loan for me of \$60,000, upon this property at five per cent., I will pay you the sum of \$800, or if you procure a loan for me of \$67,500, at five per cent., I will pay you the sum of \$1,000." Mr. Dooley claims that he accepted this proposition, and that he then started to secure either a loan of \$60,000, at five per cent. or a loan of \$67,500 at five per cent. He claims that, subsequently, he visited the officials of the Union Dime Savings Bank, and that they at first refused to recognize him in the matter, until he had some authorization from his principal; that he then called upon Mr. McNulty and induced Mr. McNulty to put in writing the terms of his employment, to wit: that the defendant would pay him \$800 for a loan of \$60,000, at five per cent., or the sum of \$1,000 for a loan of \$67,500, at five per cent; and the plaintiff claims that, after that authorization, the loan was accepted by the Union Dime Savings Bank for the sum of \$60,000, at five per cent.

During the interim, however, the plaintiff claims that he called upon Mr. Horton in reference to the loan, and that Mr. Horton said that he would call upon Mr. McNulty in reference to the matter, and that, subsequently, Mr. Horton did call and, as a result of the efforts of this plaintiff, Mr. Horton reduced the rate of interest on his mortgage of \$67,500, which this plaintiff claims was the same as making a new loan upon the property at any rate, that the result was the same, because the interest on the mortgage of \$67,500 was reduced from six per cent. to

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five per cent; and that being so, Mr. Dooley claims that he is entitled to the sum of \$1,000. This, in brief, is the claim, as I understand it, made by Mr. Dooley.

But Mr. McNulty comes into court, as his right, and urges you to support his claim, which is entirely different. Mr. McNulty says, in substance, that Mr. Dooley was a stranger to him; that Mr. Dooley came to Mr. McNulty and introduced himself; Mr. McNulty admits that he did say to Mr. Dooley, after a few interviews, that if Mr. Dooley would obtain a loan for him of \$60,000, he would pay him the sum of \$800; and that if he obtained a loan of \$67,500, he would pay the plaintiff the sum of \$1,000; and that subsequently he bound himself more fully by this agreement in writing which you have heard read. But Mr. McNulty says that, before Mr. Dooley had obtained either a loan of \$60,000 or of \$67,500, he (Mr. McNulty) wrote to Mr. Dooley a letter, in which he informed the plaintiff that he revoked the authorization; in other words, that he did not desire the plaintiff to secure a loan of \$60,000, or of \$67,500, for him. And the defendant claims that whatever arrangement he made with Mr. Horton, who at that time held a mortgage against the defendant's property for the sum of \$67,500, was made by him personally with Mr. Horton, and was not the result of Mr. Dooley's efforts at all.

So, you will see, gentlemen, that you have here a clean-cut question of fact for twelve men to decide; Mr. Dooley says he was employed to do certain work. Mr. McNulty acquiesces in that, and upon the stand testifies that he did so employ Mr. Dooley, but contends that he subsequently revoked that employment, and that the reduction of the interest rate on Mr. Horton's loan was not in any way brought about by the efforts of Mr. Dooley.

Of course, it is unquestionably true that, if Mr. McNulty did not receive any benefit from the efforts of Mr. Dooley, if Mr. Dooley did not secure a loan of \$60,000, for him, and did not secure a loan of \$67,500, for him,

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then and in that event Mr. Dooley is not entitled to a cent, and Mr. McNulty should not be called upon to pay him.

If, on the other hand, a loan of \$60,000 or a loan of \$67,500 was procured, and this result was due to the efforts of Mr. Dooley, it will then be your privilege and your right to say that the loan of \$67,500, although not actually secured as a loan, the result was the same, namely, a reduction of the rate of interest on the loan, and if you find that that reduction was due to the efforts of Mr. Dooley and not to the efforts of Mr. McNulty, then you will have the right to say that the plaintiff is entitled to a verdict in the sum of \$1,000.

All that a broker is called upon to do is to bring the principals together, the lender and the borrower. If this broker, Mr. Dooley, brought the lender, Mr. Horton, and Mr. McNulty together, and after they were brought together Mr. McNulty reaped the benefit of Mr. Dooley's efforts by securing a reduction of the rate of interest on the mortgage upon that property from six per cent. to five per cent., be it \$60,000 or \$67,500, then you would have the right to say that this plaintiff is entitled to a verdict. It is a clean-cut question of fact for you twelve men to decide. Bring to bear your business experience in deciding this case. In doing so, you have the right to take into consideration the interest of the plaintiff, the interest of the plaintiff's witnesses and the interest of the defendant. These men have testified before you upon the witness stand. It is for you to say, upon all the evidence in this case, whether the plaintiff is entitled to a verdict of \$1,000 with interest. If the plaintiff is entitled to a verdict under the law and upon the evidence, it is your duty to award him a verdict. On the other hand, if under the law and upon the evidence you believe the plaintiff is not entitled to such a verdict, then you should find a verdict in favor of this defendant.

I leave the case, gentlemen, now for your consideration.

Mr. Cohalan: I except to so much of your Honor's

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charge as refers to the defendant agreeing to pay the plaintiff, and I ask your Honor to charge that the evidence is undisputed that the letter revoking the authorization was received by the plaintiff prior to any notice on the part of the defendant that a loan was authorized by the bank.

The Court: I charge that proposition.

Mr. Cohalan: Then I ask your Honor to charge the jury that, that being so, they must find a verdict for the defendant, on the ground that the revocation was received as a matter of law prior to any acceptance by the bank.

The Court: No, I refuse to charge that; I leave it to the jury to say. I leave the jury to say whether or not Mr. Dooley received the notification prior to the acceptance by the bank. That is a question of fact for the jury to determine.

Mr. Cohalan: My point is he did not receive it prior to the acceptance by the bank, but before that acceptance was communicated to McNulty.

The Court: I leave that entirely to the jury.

Defendant excepts.

Mr. Cohalan: I ask your Honor to charge that, if the jury find for the plaintiff on the matter of the \$60,000, they must deduct from the \$800 all the expenses of the lawyers for the loans which were to be made.

The Court: I refuse to so charge.

Defendant excepts.

Mr. Cohalan: I ask your Honor to charge the jury in the same wise as to the Horton loan, on the expenses.

The Court: I refuse to so charge.

Defendant excepts.

The jury returned a verdict in favor of the plaintiff in the sum of \$1,000, with interest.

Mr. Cohalan: I now move to set aside the verdict and for a new trial on the ground that the verdict is against the weight of evidence, against the law, against the excep-

Statement of the Case

tions and on all the grounds set forth in Section 999 of the Code.

Motion denied; exception taken.

The foregoing case and exceptions contain all the evidence taken on the trial of this action.

HARRY G. HEYSON and HENRY C. GIPSON, Respondents,
v. ISAAC LICHTENSTEIN and BESSIE LICHTENSTEIN,
Appellants.

(157 App. Div. 483; 142 Supp. 596)

Pleading; complaint; suit to enjoin construction of building in violation of restrictive covenant; disjunctive allegations; demurrer

1. Under a restrictive covenant which provided that the land "shall be used and occupied solely for the purpose of a private dwelling and a private stable or garage, to be used for and in connection with such dwelling house," and the allegation of the complaint was that the defendants have "constructed certain sheds or outhouses not permitted by and in violation of the terms of the contract . . . and in violation of the covenants referred to in the deed of the said premises," it was held that this allegation consisted largely of a conclusion and that the portion thereof wherein it was stated that certain "sheds *or* outhouses" had been constructed was defective as being in the disjunctive, because the "shed *or* outhouse" may have been a storm shed over one of the doors or entrances to the dwelling house, or a wagon shed forming part of a private stable, or it may have been a conservatory or a greenhouse.¹

Appeal by the defendants, Isaac Lichtenstein and another, from an order of the Supreme Court, made at the Nassau Special Term and entered in the office of the clerk of the county of Nassau on the 5th day of March, 1913, overruling a demurrer to the complaint.

¹ No further appeal was taken from this decision.

Frederick M. Czaki, for the appellants.

J. Henry Work, for the respondents.

PER CURIAM:

Plaintiffs having an interest in enforcing restrictive covenants affecting land owned by defendants seek to enjoin the construction and maintenance of buildings upon said land. The covenant in question is to the effect that said land "shall be used and occupied solely for the purpose of a private dwelling and a private stable or garage, to be used for and in connection with such dwelling house." The allegation of the complaint is that defendants have "constructed certain sheds or outhouses not permitted by and in violation of the terms of the contract . . . and in violation of the covenants referred to in the deed of the said premises." Defendants demurred to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action, and from an order overruling said demurrer appeal.

Except the words "constructed certain sheds or outhouses," the allegation in the complaint above referred to is not the statement of a fact or facts, but a conclusion of law. Unless no shed or outhouse of any description can possibly be erected in connection with a dwelling house or a private stable or garage, without destroying the characteristic use of the land for these purposes, the complaint is insufficient, and defendants' demurrer upon that ground should have been sustained. *Beckwith v. Pirung*, 134 App. Div. 608; 119 Supp. 444. Manifestly this is not the case. The allegation is in the disjunctive. For anything that appears, the "shed or outhouse" may have been a storm shed over one of the doors of entrance to the dwelling house, or a wagon shed forming part of the private stable, or it may have been a conservatory or a greenhouse. The burden is, in the first instance, on plaintiffs to show a violation of the covenant, not upon defendants to show a compliance therewith.

Statement of the Case

The order overruling the demurrer should be reversed, with ten dollars costs and disbursements, and the demurrer sustained, with costs, with leave to plaintiffs, within twenty days after the entry of the order herein, to amend the complaint upon payment of the costs of said demurrer and of this appeal.

JENKS, P. J., BURR, CARR and PUTNAM, JJ., concurred; THOMAS, J., dissented.

Order overruling demurrer reversed, with ten dollars costs and disbursements, and demurrer sustained, with costs, with leave to plaintiffs within twenty days after entry of the order herein to amend the complaint upon payment of the costs of said demurrer and of this appeal.

LOUIS JOSEPH and RAY JOSEPH, his wife, Plaintiffs, v.
FERDINANDO SCARANO, et al., Defendants.

(County Court, Kings County, October 4, 1913)

Modification of judgment taken by default

1. Where a judgment has been taken by default the court has no jurisdiction to grant an amendment thereof on motion of the judgment debtor.¹

Motion to amend judgment.

Denied.

Grover M. Moscovitz, attorney for plaintiffs.

John C. L. Daly, attorney in person.

¹ The judgment in this case contained a provision for an allowance of 2½ % to the plaintiff. The defendant moved that this allowance be struck out and for other relief. Mr. Justice Dike held that he had no authority to do so under a default judgment. No appeal was taken from the order entered on this decision.

Statement of the Case

DIKE, J.:

The Court was desirous of modifying, so far as possible, the rigors of the judgment entered by default herein, but the case of *Bullard v. Sherwood*, (85 N. Y. 253) would seem clearly to indicate that owing to the default the Court is powerless at this time to change the terms of the judgment on motion. The motion therefore is denied, but without costs, as no discretion is lodged with the Court in an application of this kind.

JOHN F. CONWAY, Respondent, v. FARISH-STAFFORD
COMPANY, Appellant.

(157 App. Div. 481; 142 Supp. 572)

Amendment of complaint by referee; changing cause of action

1. Under a complaint demanding compensation due under a contract of employment, a referee to whom the action has been sent, has no power to permit an amendment so as to change the action to one for damages for breach of a contract, or by adding such a cause of action thereto. The plaintiff's remedy is to apply to the Special Term for leave to amend.

Appeal by the defendant, Farish-Stafford Company, from an order of the Supreme Court, made at the Queens County Special Term and entered in the office of the clerk of the county of Queens on the 24th day of April, 1913, denying a motion to vacate an order of reference.

David Leventritt (*Herman H. Oppenheimer* with him on the brief), for the appellant.

Martin L. Stover (*Edwin Blumenstiel* with him on the brief) for the respondent.

Opinion of the Court

PER CURIAM:

In the form in which this action was originally brought it was for compensation under the contract, and was clearly referable. If the amendment to the complaint which the referee allowed had the effect of changing the cause of action to one for damages for breach of the contract, or of adding to the original cause of action for compensation a second cause of action for such damages, such amendment was not within the power of the referee to grant. *Perry v. Dickerson*, 85 N. Y. 345. If plaintiff is entitled thereto, as to which we express no opinion, application therefor must be made to the Special Term. We may consider the complaint, therefore, as not effectively amended. If the amendment is made at the Special Term, either by entirely changing the form of the action or by adding an additional cause of action, the question whether, after such amendment, the entire action or either cause thereof is referable may be reviewed either by a renewal of the motion to vacate the order of reference or by an appeal from the order referring or refusing to refer said second cause of action, if the amendment takes that form.

The order should be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., BURR, THOMAS, CARR and PUTNAM, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

Complaint

BERNARD COX, Respondent, v. CADILLAC HOTEL COMPANY, Appellant.

(207 N. Y. 711; aff'g without opinion 146 App. Div. 939; 131 Supp. 1110, no opinion)

Negligence; milkman delivering milk at hotel injured by reason of defective condition of elevator ¹

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered October 31, 1911, affirming a judgment in favor of plaintiff entered upon a verdict.

L. E. Warren, for appellant.

Don R. Almy, for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, WERNER, HISCOCK, COLLIN and CUDDEBACK, JJ. Not sitting: MILLER, J.

Form No. 48

Complaint; Negligence; Milkman Delivering Milk at Hotel Injured by Reason of Defective Condition of Elevator ¹

Supreme Court, New York County.

Bernard Cox, Plaintiff, against Cadillac Hotel Company, Defendant.	}
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The plaintiff complaining of the defendant alleges:

¹ For Complaint from this case, see *post*, page 502. For Charge of Trial Judge, see *post*, page 504.

² From *Cox v. Cadillac Hotel Co.*, 207 N. Y. 711; aff'g without opinion

Complaint

FIRST: That at all the times hereinafter mentioned, the defendant was and still is a domestic corporation organized and existing under the laws of the State of New York.

SECOND: That on or about the 19th day of October, 1906, and for some time prior thereto, the defendant owned or leased, operated, managed and controlled the premises on the northeast corner of Broadway and 43rd Street, Borough of Manhattan, City of New York, known as the Cadillac Hotel, and carries on a hotel business, and in connection therewith and for the purposes thereof and as a part of said premises operated, maintained and used a certain elevator or hoist used for the purpose of receiving goods, wares and merchandise in connection with its business aforesaid and for other purposes.

THIRD: That on or about the 19th day of October, 1906, while the plaintiff was lawfully upon and using the said elevator or hoist for the purpose of delivering goods, wares and merchandise to the said premises for the use of the defendant in its said business upon said premises, and without any fault on his part and solely through the fault and carelessness and negligence of the defendant, its agents, servants and employes, and by reason of the defective and unsafe condition of said elevator, plaintiff was struck, knocked down, and crushed, and by reason thereof the plaintiff was injured internally, externally and permanently about the head, body and limbs, and was made sick, sore, lame, maimed and disabled, and he has been and will for some time to come be unable to attend to his usual duties and unable to labor by reason thereof, and has been and will be compelled to expend moneys for medical care and attendance, all to his damage in the sum of Twenty thousand dollars.

WHEREFORE, plaintiff demands judgment against the defendant above named for the sum of Twenty thousand

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dollars (\$20,000), besides the costs and disbursements of this action.

DON R. ALMY,
Attorney for Plaintiff,
68 William Street,
Borough of Manhattan,
New York City.

[*Verification.*]

JUDGE'S CHARGE¹

LE BOEF, J.:

Gentlemen of the jury, I want you, before you start a consideration of the facts of this case, to relieve your minds absolutely of any impression which you may have formed from the rulings of the Court. It is the duty of the Court to hold the scales of justice evenly balanced between the plaintiff and the defendant, and if in the course of the performance of that duty it becomes necessary for the Court, as a matter of law, to rule upon motions and upon the exclusion or admission of evidence which one of the other parties desires to introduce, that is the Court's duty. In performing that duty, the Court does not intend to express any opinion, and if you have any idea that the Court has expressed any opinion at all as to any portion or phase of this case, you must relieve yourselves of that impression. It was not the intention, and it was not the business of the Court to express any such opinion, and it is your sole business to determine this case upon the facts as exclusive judges of those facts.

It is the business of the Court now to explain to you certain propositions of law which will aid you in determining where the truth does lie, and whether or not this

¹ From *Cox v. Cadillac Hotel Co.*, 207 N. Y. 711; aff'g without opinion 146 App. Div. 939; 131 Supp. 1110, no opinion. See *ante*, page 502. For Complaint from this case, see *ante*, page 502.

Charge

plaintiff, who claims to be entitled to recover damages of the defendant, is entitled to recover those damages, and if so, for what amount.

In the first place, the plaintiff brings the defendant into court, and it therefore becomes the duty of the plaintiff to prove whatever is necessary for the plaintiff to succeed, by what we call a fair preponderance of the evidence. Now, a fair preponderance of the evidence does not mean that there shall be more witnesses upon the side of the plaintiff than upon the side of the defendant. It means that the evidence which the plaintiff submits to you shall be weightier than that which is presented upon the side of the defendant, and if you find upon the various propositions which are submitted to you that the plaintiff has proved these propositions by a fair preponderance of proof, then, and only then, is the plaintiff entitled to recover.

If, on the other hand, the evidence equally balances upon the propositions which you must find, then the plaintiff has not sustained the burden which the law imposes upon him, and he cannot recover.

In considering the evidence for the purpose of ascertaining whether or not there has been a fair preponderance of proof on the plaintiff's part, you have a right to take into consideration the interest which the parties may have, and which you may find that they have in the determination of this question.

You have a right to determine from the appearance of the witnesses, their demeanor upon the stand, whether they be truthful or untruthful witnesses, and I charge you particularly that if you believe any of the witnesses have wilfully sworn falsely upon any material fact involved in this case, then you have the right to disregard the whole evidence of that witness, except so far as it is supported or corroborated by other credible proof.

What, then, are the questions which are to be submitted to you for you to determine?

Charge

In the first place, it is the duty of the plaintiff to satisfy you that he was lawfully upon this elevator.

In the second place, it is the duty of the plaintiff to satisfy you by this fair preponderance of evidence that he was not himself guilty of any negligence which contributed to the accident which there happened, and to the injury which was there sustained.

The third proposition that he must make out by this fair preponderance of evidence is that the defendant was negligent.

We will address ourselves first to the proposition whether or not the plaintiff was lawfully upon this elevator, lawfully upon the day in question.

In the ordinary controversy between a passenger upon a railroad train or between an employé working upon the works or ways furnished to him by his master, you do not have this question, because there the relations of the parties are such that from the outset you are satisfied that the defendant owes a duty to the plaintiff, and the only questions which are usually presented in those cases are whether the plaintiff was guilty of contributory negligence and the defendant is negligent.

But in this case the plaintiff comes into Court in a little different position. He comes into Court and he shows you that he is not the employé of the defendant company, but he claims that he is one to whom that defendant company owed a duty. When I speak of the defendant company, let me say right here that something has been said in this case about the fact that this defendant is a corporation. Now, so far as prejudice is concerned, you are not entitled to any prejudice in favor of one party or the other, or any prejudice against any party. You are simply to judge this case by the evidence, so that the fact that this defendant is a corporation cannot sway your judgment in the slightest degree, so far as any prejudice is concerned. Nor, on the other hand, are you to be actuated by any motives merely of sympathy, but you

Charge

are to entirely regard my charge that the determination of this plaintiff's right to recover in this case is to be based solely upon the evidence.

Was this plaintiff on this day in October, when this accident happened—for an accident did happen there—that is conceded, and it happened on this elevator—was this plaintiff lawfully upon that elevator? I have been requested to charge and I do charge with reference to that subject, the following:

If the jury find, as a matter of fact, that at the time of the accident the plaintiff was lawfully upon the elevator in the discharge of his duty of delivering milk to the hotel, then the defendant owed him the duty to exercise reasonable care to maintain the elevator in such a condition that it could be safely used for that purpose.

In determining whether or not the plaintiff was lawfully upon the elevator at the time of the accident, the jury may consider the nature and character of the elevator itself, together with its landing stage and stopping point, and you may also consider the use which you find was actually made of it, which use you find was either known to the servants and agents of the defendant, or which ought in the exercise of reasonable care to have been known to them.

Now, at the time of the happening of this accident, the plaintiff was performing a service in which this defendant company was interested. When the defendant purchased milk from the Beeks Dairy Company and arranged for its delivery, the defendant impliedly invited the agents and servants of the said Beeks Dairy Company to enter upon its premises for the purpose of making such delivery to the place designated by the defendant.

Under the circumstances of this case, the persons engaged in delivery of milk to the defendant had the right to use any appliance furnished by the defendant to facilitate such delivery in such manner as you may find was a reasonable use of that appliance in the exercise of reason-

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able care under the circumstances, but in order that this plaintiff may recover in this case you must find that the use he made of this elevator was, under all of the evidence in this case, such reasonable use; even if you find as a matter of fact that there were signs on the door leading into the elevator shaft in the basement—if you find that the signs did not constitute a warning to the plaintiff with reference to the use of the elevator—unless you find that the signs themselves had reference to the use of the elevator, even if you find as a matter of fact that these signs near the door leading into the elevator shaft in the basement—these signs did not constitute a warning to the plaintiff unless they were of such a character and so placed as to be noticeable by a person of ordinary care and prudence.

If you find that as a matter of fact there were signs in the door leading into the elevator shaft—if you also find that those signs were placed as, and had reference to a warning of the existence of the elevator shaft and the danger of walking into or falling into the shaft itself, then those signs did not constitute a warning or instruction with reference to the use of the elevator.

In considering the question whether such signs, if you do find that they actually did exist, and you will remember that there is a controversy as to that fact—in considering the question as to whether such signs had reference to the use of the elevator, you may consider that Section 492, Chapter 275, of the Laws of 1892, requires that every freight elevator or lift shall have a notice posted conspicuously thereon, reading as follows: "Persons riding on this elevator do so at their own risk."

In considering the question as to whether the plaintiff was lawfully upon the elevator, you may consider that there is no evidence that the defendant complied with the provisions of Section 492, Chapter 275, of the Laws of 1892, which I have just read to you.

Now, gentlemen of the jury, you will see that your first

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proposition which you must find, in order that anything can be accorded to this plaintiff, is that he was lawfully upon that elevator upon the day in question.

Now, if you do so find, then the next proposition to which you must address yourselves is whether or not upon that day he was guilty of any negligence which contributed to the injury from which he is now suffering, and I charge you as a matter of law that after you have examined all of this evidence, taking all of it in consideration, you come to the conclusion that this plaintiff upon this day in question was guilty of contributory negligence, then you must stop there, for there is nothing further to be done so far as he is concerned, and your verdict will have to be a verdict of no cause of action.

If, on the other hand, you are satisfied from all the evidence in the case that he was not guilty of contributory negligence, and you are satisfied that he himself was using a reasonable degree of care under all of the circumstances in the case, then you may proceed to the third question for your determination, whether or not this defendant was guilty of negligence.

I shall not undertake to recite or rehearse the evidence upon the subject of the defendant's alleged negligence.

You have heard the testimony on the part of the plaintiff and certain phenomena that are claimed to have been witnessed by some of these witnesses, and you have heard the testimony on the part of the defendant tending, as the defendant claims, to show that these phenomena could not have existed at all.

The controversy with reference to the defect, if a defect existed, is narrowed right down to this peculiar form of shaking or jerking, which the plaintiff's witnesses say that they observed, and which the defendant upon the other hand says could not have occurred at all.

It appears from the evidence on the part of the plaintiff that the phenomena which they claim existed, were capable of having been produced by a certain condition

Charge

which they claim the defendants could and should have remedied.

If this plaintiff was lawfully upon that elevator; if he was not guilty himself of contributory negligence then it remains for you to determine under all of this evidence whether or not this defendant, who under those circumstances would have been required to use reasonable care in the construction, control and operation or use of that elevator, not to injure people who came upon it lawfully—it is for you to determine whether or not the defendant has been derelict in that regard, and if you do so determine, if you reach the conclusion that the plaintiff has sustained the burden upon all these propositions, then it is your duty to come to the last question, which is the question of damages.

If, upon the other hand, you are satisfied that the evidence balances upon that proposition, there is no evidence here sufficient to satisfy you that the defendant was guilty of negligence which caused this accident, then, in that case, it would be your duty to stop right there and bring in your verdict of no cause of action for the defendant.

Assuming that you have passed all those three propositions favorably to the plaintiff, you come down then to the fourth and last proposition which I must submit to you under those circumstances, and under those circumstances only and that is what damage has this plaintiff sustained.

As to that question you may take into consideration the earning capacity of the plaintiff, you may take into consideration the actual pecuniary loss which he has sustained in losing his ability to labor for the period up to the time of this trial, which has been testified to; you may take into consideration the amount he has expended in seeking to cure himself of the injuries which he has sustained, and you may take into consideration the pain and suffering that reasonably and naturally flows from this accident or the injury from which he is now suffering.

Charge

Having taken all those into consideration up to the present time, you may go further and you may consider the alleged permanence of this injury, and you may go further and consider the effect of that upon his earning capacity for such a period as you, as men of good common sense, would determine he would be likely to live.

Now, I beseech your very serious consideration of that question if you reach it. You are not to speculate. This defendant wants, and the plaintiff, on the other hand, is entitled to—a fair consideration, and you are not to be swayed by any prejudice or sympathy if you reach that point in the case; you are to take that not as a speculation, but as an honest conviction on your part, fairly considering and fairly treating these two propositions. You are to determine in that way the extent of the damage to which the plaintiff is entitled at the hands of this Court.

You must bear in mind as we sit here the plaintiff's counsel and the defendant's counsel are officers of this court, and as a matter of fact, they have presented their case seriously and carefully, and you are a part of the Court under the solemn obligation and oath to fairly weigh the evidence in this case, and I know you will fully perform the duty which the law imposes upon you.

The jury thereupon retire, and upon returning to the court room, state they find a verdict for the plaintiff in the sum of \$4,500.

Mr. Oakes: The defendant moves to set aside the verdict on the ground that it is contrary to the law and against the weight of evidence, and on all the grounds mentioned in Section 999 of the Code of Civil Procedure.

Motion denied.

Mr. Oakes: Exception.

MARY SOMMER, Respondent, v. THE ARMOR GAS AND
OIL COMPANY, Appellant ¹

(207 N. Y. 739; aff'g without opinion 147 App. Div. 919; 131 Supp.
1144, no opinion)

**Corporations; suit to compel corporation to sell to stockholder pro-
portion of increased capital stock at par pursuant to by-laws**

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered December 4, 1911, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at an Equity Term in an action to compel the defendant to issue to plaintiff a certificate for certain shares of its stock upon payment by her of its value at par.

Simon Fleischmann for appellant.

Thomas R. Stone, for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J.; GRAY, WILLARD BARTLETT,
HISCOCK, CUDDEBACK, HOGAN and MILLER, JJ.

¹ For Complaint from this case, see *post*, page 513. For Findings, see *post*, page 515.

Complaint

Form No. 49

Complaint; Corporations; Suit to Compel Corporation to Sell to
Stockholder Proportion of Increased Capital Stock at Par Pur-
suant to By-Laws ¹

Supreme Court, Erie County.

Mary Sommer,	}
Plaintiff,	
against	
The Armor Gas & Oil Com- pany,	
Defendant.	}

The plaintiff complaining of the defendant, alleges:

FIRST: That at all the times hereinafter mentioned, the defendant was and still is a domestic corporation, having its principal office in Armor, Erie County, N. Y.

SECOND: That on and prior to August 27th, 1910, the defendant had a capital stock of \$10,000 divided into 400 shares of the par value of \$25.00 each, and that the plaintiff was, and since about the organization of said defendant has been and still is the owner of six such shares, and holds the certificate of said company for the same. That said company was and is sinking gas wells in the Town of Hamburg, and it is now and has been supplying gas at a large profit, and is earning large dividends on said stock and the increased capital, and as plaintiff is informed and believes, the same will constantly increase, thereby making the shares of said defendant of large value.

THIRD: That pursuant to notice given according to law, the capital stock of said defendant corporation was increased on or about the 27th day of August, 1910,

¹ From *Sommer v. The Armor Gas & Oil Co.*, 207 N. Y. 739; aff'g without opinion 147 App. Div. 919; 131 Supp. 1144, no opinion. See *ante*, page 512. For Findings, see *post*, page 515.

Complaint

from the sum of \$10,000 to the sum of \$25,000, such increase of capital being represented by 600 shares of said company, of the par value of \$25.00 each.

FOURTH: That Section 24 of the by-laws of the defendant, duly and regularly adopted for the management of the business of said defendant corporation, is as follows: "Whenever the capital stock of the corporation is increased, each bona fide owner of its stock shall be entitled to purchase at the par value thereof an amount of stock in proportion to the number of shares of stock he owns in the corporation at the time of such increase," and the plaintiff as such stockholder as aforesaid, had the right to have allotted and issued to her at par, such proportion of said increased stock as her holdings in said company bore to the whole capital stock thereof prior to such increase, and such proportion was and is nine shares of such increased capital stock.

FIFTH: That the plaintiff in due time and before the commencement of this action, offered to take and pay for at par the said nine shares of said increased capital stock, and duly tendered to the defendant payment therefor.

SIXTH: The plaintiff alleges that in violation of her rights and not regarding its duties to the plaintiff in the premises, the defendant, its officers and agents, refused to issue said shares of stock to the plaintiff and to receive payment therefor, and have failed and still refuse to deliver said stock to the plaintiff or any part thereof, although a large amount of said increased capital stock has been issued and delivered to some of the stockholders of said corporation, upon the payment of the par value thereof to it.

WHEREFORE, plaintiff demands judgment as follows:

I. That the defendant be ordered and adjudged to issue and deliver to the plaintiff a certificate for nine shares of its capital stock, upon payment to it by the plaintiff of the par value thereof.

Findings

II. In case said shares of increased capital stock cannot be so issued, that the plaintiff have judgment against the defendant for damages in the premises.

III. For the costs and disbursements of this action, and such other and further relief as she may be entitled to.

THOMAS R. STONE,
Attorney for Plaintiff,
306 Mutual Life Bldg.,
Buffalo, N. Y.

[*Verification.*]

Form No. 50

Findings; Corporations; Suit to Compel Corporation to Sell to
Stockholder Proportion of Increased Capital Stock at Par Pur-
suant to By-Laws ¹

Supreme Court, Erie County.

Mary Sommer,	}
Plaintiff,	
against	
The Armor Gas & Oil Com- pany,	
Defendant.	

DECISION

This action being at issue and having been tried by the undersigned without a jury at the Equity Term held in and for the County of Erie, March, 1911, and the Court having heard the proofs and allegations of the parties, the plaintiff having appeared by Thomas R. Stone, Esq., her attorney, and the defendant by Simon Fleischmann,

¹ From *Sommer v. The Armor Gas & Oil Co.*, 207 N. Y. 739; aff'g without opinion 147 App. Div. 919; 131 Supp. 1144, no opinion. See *ante*, page 512. For Complaint from this case see *ante*, page 513.

Findings

Esq., its attorney, and this cause having been submitted to the Justice holding said term on the 22nd day of March, 1911, and due deliberation having been had thereon, the Justice holding said term and hearing said case, hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. That the defendant was and still is a domestic corporation having its principal office in Armor, Erie Co., N. Y.

II. That on and before August 27, 1910, the defendant had a captial stock of \$10,000 divided into 400 shares of the par value of \$25.00 each, and the plaintiff became the owner of six shares of the capital stock of the defendant a short time after the organization thereof and holds the certificate of the defendant therefor.

III. That the business of the defendant is sinking wells and producing gas for commercial purposes, and that its stock is worth more than the par value thereof.

IV. That on or about the 27th day of August, 1910, the defendant took proper proceedings to increase its capital stock from the sum of \$10,000 to the sum of \$25,000 the increased capital stock being represented by 600 shares of the par value of \$25.00 each.

V. That Section 24 of the by-laws of the defendant in force at the time said stock was increased is as follows: "Whenever the capital stock of the corporation is increased, each bona fide owner of its stock shall be entitled to purchase at the par value thereof an amount of stock in proportion to the number of shares of stock he owns in the corporation at the time of such increase."

VI. That at a meeting of the stockholders of the defendant on the 12th day of September, 1910, the plaintiff was allotted shares in proportion to her original holding at par, and was notified to pay for same on or before September 22, 1910, pursuant to resolution passed at said stockholders' meeting, but no notice was given that

Findings

failure to pay for said shares within ten days, would forfeit her right to take the stock.

VII. That shares of the increased capital stock were actually paid for by original stockholders as per allotment made at said stockholders' meeting, as late as September 24th, 1910, the money to pay for same being received by the corporation without protest, and new shares were issued to them.

VIII. That 75 shares of the par value of \$25.00 each of said increased capital stock of the defendant company remains in its treasury unissued.

IX. That the plaintiff applied to the secretary of the defendant on or about the 4th day of October, 1910, and demanded that nine shares of the increased capital stock to which she was entitled, be issued to her, and that she was then ready and willing to pay the par value of said stock to said company, but said officer refused to issue said stock, basing his refusal upon the ground that the plaintiff was too late and could not get it.

X. That on or about the 8th day of October, 1910, the plaintiff applied to the president, secretary and treasurer of the defendant company, at a meeting of the board of directors held on that day, and demanded that nine shares of stock of said company, to which she was entitled, be issued to her, and that she was ready and willing to pay for same, but said officers refused to issue said stock or to accept payment for the said nine shares of stock.

XI. That the plaintiff was ready and willing to pay and offered to pay for the number of shares of increased capital stock allotted to her, on each occasion when she demanded the stock, but did not actually tender the amount of money equal to the par value thereof.

XII. That 525 shares of the increased capital stock of the defendant had been issued to original holders of its capital stock at the par value thereof, who applied for the same before and up to midnight on the 24th day of September, 1910.

Statement of the Case

CONCLUSIONS OF LAW

I. That the plaintiff had the right to demand and she was entitled to receive the shares of increased capital stock which had been allotted to her, upon payment of the par value thereof, as long as the same remained in the treasury of the defendant unsold.

II. That the plaintiff is entitled to judgment against the defendant, that it forthwith issue and deliver to the plaintiff a certificate for nine shares of its capital stock, upon the payment to it by the plaintiff of the par value thereof.

III. That the plaintiff also have judgment for the costs and disbursements of this action.

Judgment is ordered accordingly.

CUTHBERT W. POUND,
Justice of the Supreme Court.

Dated April 19, 1911.

LESLIE G. LOOMIS et al., Respondents, v. LEHIGH VALLEY
R. R. Co., Appellant ¹

(208 N. Y. 312; modifying and affirming 147 App. Div. 195; 132 Supp.
138)

**Carriers; common law duty of carriers to provide cars properly
equipped for transportation of grain and farm products in bulk;
conflict of laws; remedy under Federal Act; when exclusive**

1. In the absence of statutory regulation it is the duty of a railroad which undertakes to carry grain and farm products in bulk to furnish cars properly equipped for such service, and where the shipper is compelled to expend money in supplying a defect in such cars the railroad company is liable to the shipper for such expense.
2. Where a Federal Statute provides an exclusive remedy in such a case and the statute provides that it may be enforced

¹ For Complaint from this case, see *post*, page 538.

Statement of the Case

in a way or before a special tribunal the aggrieved party will be left to the remedy given by the statute which created the right.

Appeal from a judgment entered November 21, 1911, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for plaintiffs upon the verdict rendered in their favor at the Trial Term.

The action was brought to recover the cost of lumber which the plaintiffs, as shippers of produce over defendant's railroad, bought and used for the purpose of making certain freight cars furnished by the defendant suitable for such shipments. At the Trial Term the Court directed a verdict for the amount of the plaintiffs' claim, and denied defendant's motion for the direction of a verdict in its favor. The exceptions to these rulings were ordered heard at the Appellate Division in the first instance, where they were overruled, and the present appeal is from the judgment entered upon that disposition of the case.

The plaintiffs are copartners in the business of buying, selling and shipping grain, apples, potatoes, onions, cabbage and other farm products, and their principal office is at Victor, N. Y. The defendant is a railroad corporation organized under the laws of the State of Pennsylvania, and is a common carrier which solicits and accepts such products for transportation over its road from its stations at Victor, Farmington, Stanley, Mendon, Henrietta, East Rush, Cedar Swamps, Rochester Junction, Clifton Springs, North Le Roy and other places in the State of New York to other points in the United States, both within and without the State of New York. The plaintiffs buy the grain and produce from farmers who draw it to the railroad stations in their respective localities, where it is loaded into box cars for shipment in bulk. In order to

Statement of the Case

load such cars to the minimum capacity upon which the freight rates are based, and the maximum to which the shipper is entitled, it is necessary that they should be equipped with grain doors or bulkheads. Grain doors consist of boards cut to the proper length for nailing on the inside of the cars at the regular doors, which are on the sides of the cars midway between the ends. The regular car doors are either of the sliding or swinging type, and the purpose of the grain doors in either case is to permit the loading of the cars to their proper capacity, to safely contain the load, and to enable the unloading to be done without unnecessary waste or inconvenience. These grain doors are sometimes called bin doors, and that characterization at once explains their use. The loading of grain and produce in bulk begins at the two ends of the cars, and as the accumulating volume seeks a level which brings it to the open doors, the bin boards are attached one after another as the load increases until the proper height is reached. Thus the produce is kept from leaking in transit, and saved from waste during the process of loading and unloading. Bulkheads serve the same purpose, the only difference being that in their use the two ends of the cars are converted into two separate bins. In that case the bin boards, instead of being nailed lengthwise of the cars to close the door openings, are placed transversely of the cars on either side of these openings so as to leave a passage between them.

For many years prior to 1906 it had been the custom of the defendant to furnish cars fitted with grain doors for the shipment of produce in bulk, or the lumber from which the shipper could make grain doors or bulkheads, and for this purpose lumber had been placed from time to time at the various stations where the shipper could help himself to what he needed. The same custom prevailed on other railroads in various parts of the country.

From August, 1906, to May, 1908, the plaintiffs continued, as before, to bring to the defendants for trans-

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portation carload lots of produce to be sent in bulk, which the defendant continued to receive but for which it neglected and refused either to furnish cars fitted with grain doors or bulkheads or the lumber wherewith to construct the same, although the plaintiffs demanded proper cars for the protection and transportation of their shipments. Upon the defendant's refusal to comply with these demands, the plaintiffs bought and used the necessary lumber to construct the grain doors and bulkheads in the various cars which are enumerated in Schedule "A" annexed to the complaint. The sums thus expended averaged \$1.60 per car and amounted to a total of \$322.07, for which the plaintiffs presented to the defendant a statement with demand of payment which was refused. Thereupon this action was brought with the result above stated.

None of the facts essential to the plaintiffs' alleged cause of action are controverted either in the defendant's answer or in the evidence. The defendant relies upon the assertion (1) that it was under no common-law duty to furnish to the plaintiffs cars equipped with grain doors, bin doors or bulkheads, and (2) that even if such a duty had ever existed it had been abolished by the provisions of the Interstate Commerce Act of February 11th, 1887, and the Elkins Act of February 19th, 1903, and the Public Service Commissions Act of the State of New York (L. 1907, ch. 429), pursuant to which the defendant had filed tariffs of rates which contained no provision for payments or allowances to shippers for grain doors, bin doors or bulkheads placed in cars by them.

The particular sections of the Public Service Commissions Act of the state of New York (L. 1907, ch. 429) upon which the defendant relies are sections 28, 33 and 49, of which we shall quote only the pertinent parts.

Section 28 provides for the filing and publication of tariff schedules which shall set forth, among other things, "the places between which property and passengers will be carried, and shall also contain the classification of

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passengers, freight or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, *all privileges or facilities granted or allowed*, and any rules or regulations which may in any wise change, affect or determine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee."

Section 31 provides: "No common carrier shall, directly or indirectly, by any special rate, rebate, drawback, or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered in the transportation of passengers, freight or property, except as authorized in this act, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances and conditions."

Section 33 directs that "No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers, freight or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances."

Section 49 declares: "Whenever either commission shall be of opinion, after a hearing, had upon its own motion, or upon a complaint that the rates, fares or charges demanded, exacted, charged or collected by any common

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carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, * * * the commission shall determine the just and reasonable rates, fares and charges * * * to be charged. * * * And whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances, or service of any such common carrier, railroad corporation or street railroad corporation in respect to transportation of persons or property within the state are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and service thereafter to be in force."

The foregoing excerpts from the Public Service Commissions Law of this state are, of course, germane only to the *intrastate* shipments made by plaintiffs over the defendant's road; and of such shipments there are only 29 as against 172 *interstate* shipments, to which the provisions of the Interstate Commerce Act are applicable.

The various parts of the Interstate Commerce Act, and its amendments, which bear upon the contentions of the parties with reference to interstate shipments, are section 1, paragraph 1, which provides: "That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory."

Section 1, par. 2, which defines the term "transportation" to mean "cars and other vehicles and all instru-

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mentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Section 6, par. 1, which provides for the filing, printing and posting of schedules of rates by common carriers which "shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee."

Section 6, par. 7, which provides that: "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 9, which provides: "That any person or per-

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sons claiming to be damaged by any common carrier subject to the provisions of this act, may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such carrier may be liable under the provisions of this act in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of such remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

By section 1, par. 1, of the Elkins Act, which went into effect in 1903, carrier corporations, as well as their officers and agents, are subjected to criminal prosecution and penalties for the wilful failure to file and publish the tariffs or rates and charges required by the Interstate Commerce Act; and it is declared to be "unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced."

In paragraph 2 of the same section of the Elkins Act it is provided that "Whenever any carrier files with the Interstate Commerce Commission, or publishes a particular rate under the provisions of the act to regulate commerce or the acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act, shall be conclusively deemed to be the

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legal rate, and any departure from such rate, or any offer to depart therefrom shall be deemed to be an offense under this section of the act."

Further facts appear in the opinion.

Lyman M. Bass and Thomas R. Wheeler, for appellant.

Edward P. White and John Colmey, for respondents.

WERNER, J.:

The first question to be considered is whether, independently of the Federal and State statutes, the defendant was subject to a common-law duty to its shippers to furnish them cars equipped with bin doors or bulkheads for the shipment of grain and other produce in bulk. This question need not be discussed at length. It is the settled law that a common carrier must provide itself with vehicles which are safe and sufficient for the purpose intended. (Hutchinson on Carriers, sec. 497; *Cincinnati, N. O. & T. P. Ry. Co. v. Fairbanks & Co.*, 90 Fed. Rep. 467; *Chicago & Alton R. R. Co. v. Davis*, 159 Ill. 53.) We are not now considering the matter of rates, tariffs or regulatory legislation, but the primary duty of the carrier to do that which he undertakes to do. When a carrier solicits and receives produce for shipment in bulk, the law implies the obligation to furnish cars which are reasonably fit for that service; and when the carrier fails in that duty, to the damage of the shipper, the latter may ordinarily invoke his remedy at law to recover the loss which results from the dereliction of the former. There are instances, however, in which the predicament of the shipper and the degree of the carrier's dereliction are elements to be considered in determining the remedy to be applied. When the shipper brings his produce to a country station, where there are no facilities for storage, and discovers that the carrier has furnished cars which are not fit for their intended service, but which can be made so by a trifling expenditure of

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labor and money, it is but reasonable that the shipper should be permitted, for the advantage of both, to perform the initial duty of the carrier, and charge it with the fair expense. Any other course would entail upon both unnecessary hardship and loss. The carrier could be mulcted in damages out of all proportion to its slight infraction of duty, and the shipper subjected to losses, under his contracts with others, not within the scope of the carrier's agreement, and thus irremediable. These considerations, and others of mutual convenience, are doubtless responsible for the long standing and practically universal custom in this part of the country of permitting the shippers of grain and produce in bulk to equip cars furnished for such service with the necessary bin doors or bulkheads when the carrier has failed to do so. The record discloses that for many years prior to 1906 it had been the custom for the defendant and of other railroads in this State to furnish shippers of grain and produce in bulk the lumber with which to convert ordinary freight cars into suitable conveyances for such shipments, and that without the addition of bin doors or bulkheads such cars are not suitable for the service. It appears that they cannot be loaded to the minimum capacity upon which the freight rate is based, or the maximum which, in the interest of the shipper, they are designed to hold. If the shipment happens to be grain, the load naturally gravitates to the level at the car doors where the pressure may create a space through which the load is jolted out in transit. And in unloading there is also a degree of waste and inconvenience, because a car laden with grain or other loose produce, and not equipped with bin doors or bulkheads, cannot be opened without spilling some of its contents. As to the shipments set forth in the schedule annexed to the complaint, the defendant refused, after demand by the plaintiffs, to equip its cars with the necessary appliances. Without them the cars were practically useless. We think that, in

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these circumstances, the plaintiffs were justified in furnishing the necessary lumber, and that for the concededly reasonable expense incurred by them they are entitled to recover from the defendant, unless the provisions of our Public Service Commissions Law or of the Interstate Commerce Act have established a different rule.

In view of the legislation to which we have referred, the subject under discussion naturally divides itself into two distinct branches. The one relates to intrastate shipments, and the effect of our State legislation upon the common-law rights and obligations of the parties, and the other refers, of course, to interstate transportation, in respect of which the effect of the Federal statutes is to be considered.

The defendant relies upon certain provisions of the Public Service Commissions Law to exempt it from the liability to which it has thus far been held for the expense which the plaintiffs incurred in fitting, for bulk shipments of grain and other produce, the 29 cars which were used in intrastate traffic. We are referred to parts of sections 28, 31 and 49 of the act, which we have quoted; but we find in them nothing which is directly controlling of the question. Section 28 deals with the matter of publishing tariff schedules, which shall "state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, *all privileges or facilities granted or allowed*," and any rules or regulations which may affect or determine rates, "or the value of the service rendered to the * * * shipper." Section 31 forbids unjust discrimination, rebate, drawback, or other device by which one shipper may be favored in service or charges over other shippers in similar conditions; and section 49 provides that "whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances, or service of any such common carrier * * * in respect to trans-

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portation of * * * property within the State are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances, and service thereafter to be in force," etc. A closer view of these sections reveals their inapplicability to the precise question here involved. This is not a case of unjust discrimination against the shipper; nor yet a case in which there has been a hearing by the commission, either upon its own motion or upon complaint, as to the practices, equipment or service of the carrier; nor even a case in which there was any action by the commission arising out of the carrier's failure to promulgate tariff schedules stating, among other things, the "privileges or facilities granted or allowed" to the shipper. We are concerned in this action with the antecedent duty of the carrier to furnish "sufficient and suitable cars for the transportation of such freight in carload lots (Section 37) with reference to which the commission had not acted at the time when this controversy arose. Primarily the question is not one of rates or regulation at all, but of the carrier's failure to perform its initial duty to give the shipper cars fit for the service for which they were furnished. That is obviously a duty with reference to which the commission has power to make rules and regulations, and even rates, but until it acts within the scope of its powers the subject is one of which our Courts have cognizance under the general rules of law. Except for the small amount involved in this branch of the case the question is of merely academic interest, for the commission has since had a hearing upon the complaint of the New York State Shippers Protective Association against this defendant, impleaded with other railroad corporations, and has decided that "the legal duty of the carrier to furnish a suitable car for the transportation of either grain, potatoes or other bulk produce, includes provision of a proper inside guard for the carload." Under that

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decision, which was rendered in November, 1909, all common carriers of such bulk shipments are now required to furnish cars equipped with inside or grain doors, bulkheads, or other proper devices, so that loading or unloading may be accomplished with reasonable facility; or, in the alternative, if the carrier and the shipper deem their convenience best served by allowing the shipper to furnish these appliances, the carrier may make a stated allowance therefor, not less than the full average cost thereof, which shall be stated in its published tariffs, and shall leave to the shipper the option to supply either grain doors or bulkheads. In common with other carriers within the State, the defendant has so amended its tariff schedules as to comply with this decision, and the commission has fixed the rates with reference to this practice. The question is now one of rates, because the commission, acting within the range of its powers, has made it so. The carrier is given the alternative of furnishing a car suitable for shipment of bulk produce, or of permitting the shipper to do so, but in either event the tariff schedules filed by the carrier must disclose the uniform charges in the one instance, and the uniform allowance in the other. This power of fixing rates and making regulations concerning intrastate traffic is clearly within the jurisdiction of our State public service commission, but their determinations are not retroactive. It is true that the commission did not act until November, 1909, with reference to the shipment of cars used in intrastate shipments of produce in bulk, but it is that very fact which, in our judgment, left unaffected the jurisdiction of our State Courts to deal with the question until the commission had exercised its power over the subject. These views lead to the conclusion that the plaintiffs are entitled to recover the money expended by them in equipping with grain doors and bulkheads the intrastate cars set forth in the schedule annexed to the complaint.

The view which we are to take of the rights of the

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plaintiffs in respect of their interstate shipments is necessarily governed by considerations entirely different from those which have led to our conclusion as to the intrastate shipments. Here we are upon different ground for we are now dealing with Federal statutes and with the decisions of Federal Courts in demarking their effect and interpretation. If the subject is covered by the enactments of Congress, and if the Federal Courts or tribunals are invested with jurisdiction over it, our jurisdiction is at an end, without regard to what it may have been at common law or under our own statutes. The first thing to be noticed is that the Interstate Commerce Act and the acts auxiliary thereto are much more comprehensive and drastic than our Public Service Commissions Law. Section 2 of the Interstate Commerce Act defines the term "transportation" as meaning "cars and other vehicles and all instrumentalities and facilities of shipment and carriage" and all services in connection therewith and in the "handling of the property transported." Section 6, par. 1, directs the making, printing, filing and posting of tariff schedules "which shall plainly state the places between which property * * * will be carried, * * * the classification of freight in force, * * * all terminal charges, storage charges and icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed." The same section, par. 7, prohibits any carrier from engaging in interstate traffic unless the tariff schedules have been promulgated as stated, and forbids any different or other charge or compensation than the published rate, or the taking of any different rates than those specified. Section 1, par. 2, of the Elkins Act subjects all corporations and their officers and agents to prescribed penalties for any violation of any of the foregoing provisions, and paragraph 2 of the same section makes it a punishable offense to even offer to depart from the rates thus established. Section 9 of the Interstate Commerce Act provides:

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"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act *may either make complaint to the commission* as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damage for which such common carrier may be liable under the provisions of this act, *in any district or circuit court of the United States of competent jurisdiction*; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." There are other sections of the statutes which have a bearing, but we have quoted enough to make it clear that the general subject is one of which the Congress of the United States has assumed control. It has enacted a statute giving to any person claiming to have been damaged by any carrier subject to the act, his choice of two tribunals in which his grievance may be considered and decided. He may go in the first instance to the Interstate Commission, or he may sue in the Federal Courts, but he must choose between these two. Congress has not only acted in the premises, but it has prescribed in terms which indicate an intention to exclude all others, the tribunals to which the claimant must address himself. This is what accentuates the distinction between the interstate and the intrastate questions. In this State, under our own statute, the question is whether our commission has acted upon a subject which, although involving the common-law duty of furnishing proper cars, could be brought into the sphere of rates by proper administrative action; and that, as we have seen, was not done until after the period covered in the complaint. Under the Federal statute, the question is not whether the Interstate Commission has acted, but whether Congress has assumed such control of this feature of interstate commerce as to divest our State Courts of the jurisdiction which they had before the Federal statutes were enacted. Upon that ques-

tion there is little we can say, except to cite the decisions of the Supreme Court which very plainly speak for themselves. In the recent case of *Chicago, R. I. & Pac. Ry. Co. v. Hardwick Farmers' Elevator Co.*, 226 U. S. 426, that Court considered the effect of the Interstate Commerce Act, upon the Minnesota Reciprocal Demurrage Law under which railroad carriers were subjected, upon the demand of the shipper, to a demurrage charge of \$1.00 per car for each day's delay in furnishing cars, and also a reasonable attorney's fee. In discussing the Interstate Commerce Act and its effect upon the Minnesota statute, Chief Justice WHITE spoke for the Court as follows: "As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce and the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only a permissive power." (p. 435.)

To the same effect is the case of *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, where the question was one of rates. The syllabus very succinctly

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paraphrases the opinion as follows: "The Interstate Commerce Act was intended to afford an effective and comprehensive means for redressing wrongs resulting from unjust discriminations and undue preference, and to that end placed upon carriers the duty of publishing schedules of reasonable and uniform rates; and, consistently with the provisions of that law, a shipper cannot maintain an action at common law in a State Court for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the act, and had not been found to be unreasonable by the Interstate Commerce Commission." The same rule was laid down in *Southern Ry. Co. v. Reid*, 222 U. S. 424, where there was a conflict between the Interstate Commerce Law and a statute of North Carolina imposing a penalty upon carriers for any refusal to receive freight at any regular station or to forward the same by a route selected by the person tendering the same; and in *Northern Pac. Ry. Co. v. Washington*, 222 U. S. 370, 378, it was held that the "Hours of Service Law" applicable to railroads engaged in interstate traffic, passed by Congress in 1907, although not to take effect for a year after its enactment, at once superseded the State statutes relating to the subject. Here again the Supreme Court, speaking through Chief Justice WHITE, announced it as "elementary * * * that the right of a State to apply its police power for the purpose of regulating interstate commerce * * * exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power."

It would add to the discussion nothing but increased length to quote more from the many cases which deal with this subject. We cite a few which fully sustain the foregoing expressions of the Supreme Court, and others which clearly show that the subject-matter involved in the case at bar is regarded as being under the control of

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the Federal commission. (*McNeill v. Southern Ry. Co.*, 202 U. S. 543; *Atlantic Coast Line R. Co. v. Macon Grocery Co.*, 166 Fed. Rep. 206; *affd.*, 215 U. S. 501; *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; *Morrisdale Coal Co. v. Penn. R. R. Co.*, 176 Fed. Rep. 748; *Clement v. Louisville & N. R. R. Co.*, 153 Fed. Rep. 979; *D. & R. G. R. R. Co. v. Baer Bros. Mer. Co.*, 187 Fed. Rep. 485.) Neither would it be profitable to dwell at length upon the difference, contended for by plaintiff's counsel, between a question of rates and a carrier's common-law duty to furnish cars suitable for the traffic in which he engages. Conceding its existence and admitting the abstract soundness of the argument, the fact remains that Congress has made it a question of rates over which the Interstate Commerce Commission has exclusive control, and in respect of which any justiciable controversy is referred exclusively to the Federal courts. There are many cases in which the State Courts may enforce a right of action arising under an act of Congress, but only when the act expressly confers such jurisdiction or is silent upon the subject. This rule and the reasons upon which it rests are well stated in *Galveston, H. & S. A. Ry. Co. v. Wallace*, 223 U. S. 481, 490: "Statutes have no extra-territorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another State. But it is now recognized that the jurisdiction of State Courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought. *When the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right.* But jurisdiction is not defeated by implication.

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And, considering the relation between the Federal and the State governments, there is no presumption that Congress intended to prevent State Courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal Statute." That was written in a case involving the liability of an initial carrier for non-delivery of goods by the connecting carrier, and in which it was held that the damages caused by the failure to deliver the goods were not traceable to a violation of the Interstate Commerce Law. To the same effect are *Missouri Pac. Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, and *N. Y., N. H. & H. R. R. Co. v. New York*, 165 U. S. 628. In the *Second Employers' Liability Cases*, 223 U. S. 1, 57, the jurisdiction of the State Courts under the Federal Employers' Liability Law was recognized upon the distinct ground that the statute gave the Circuit Courts of the United States jurisdiction that is not exclusive, but only concurrent with the jurisdiction of the Courts of the several States.

We have yet to consider whether we can divide the single judgment recovered by the plaintiffs, so as to sustain that part predicated upon the intrastate shipments, and to disallow for lack of jurisdiction that part which rests upon the interstate shipments. The general rule in actions at law is that upon appeal from a single judgment the appellate court must affirm or reverse as to the whole of the recovery and as to all the parties. (*Goodsell v. Western Union Tel. Co.*, 109 N. Y. 147; *Wolstenholme v. Wolstenholme File Mfg. Co.*, 64 id. 272; *Nat. Bd. of Marine Underwriters v. Nat. Bank of the Republic*, 146 id. 64.) The reason of the rule is that it would produce endless confusion and embarrassment in the administration of justice to permit single causes of action and judgments to be split up so that different parts thereof could be in litigation in different Courts at the same time. We do not think this case is within the reason

of the rule. Although there is no separation of causes of action either in the complaint or in the judgment, there are manifestly two such causes if we are right in holding that there is a distinction between intrastate shipments and interstate shipments. They are easily separable. The result of our decision is that the plaintiffs are entitled to recover upon one and not upon the other. In these circumstances it is both logical and just to make an end to the litigation by directing that the judgment shall be reduced to \$64.45, and as thus modified affirmed, without costs of this appeal to either party. (*Wolstenholme v. Wolstenholme File Mfg. Co.*, *supra*; *Board of Underwriters v. Nat. Bank of the Republic*, *supra*.)

GRAY, J.(dissenting).

I am of the opinion, if, as it is conceded, the common-law duty of the defendant in this case extended to the furnishing of cars sufficiently equipped for the carriage of the plaintiff's produce, that the obligation existed at the place of shipment and was enforceable, whatever the destination of the freight. The argument that the interstate commerce acts confer exclusive jurisdiction upon the Federal Courts to determine claims and cases of infractions of agreements relating to shipments beyond State lines does not impress me as sound in its application to the present case. I think that the Courts of this State did not lose their jurisdiction to enforce the obligation, which arose, or was implied, in the transaction between the parties. In the cases decided by the United States Supreme Court, to which Judge WERNER refers in his opinion, the States had enacted laws which operated in regulation of the duties and obligations of carriers of interstate traffic. This case does not present a question where the State has undertaken to exert its authority over subject-matters, which, by congressional action, had been brought within Federal control.

For these reasons, briefly, I dissent.

Complaint

CULLEN, Ch. J., WILLARD BARTLETT, CHASE, COLLIN and HOGAN, JJ., concur with WERNER, J.; GRAY, J., reads dissenting opinion.

Judgment accordingly.

Form No. 51

Complaint; Carriers; Common-law Duty of Carriers to Provide Cars Properly Equipped for Transportation of Grain and Farm Products in Bulk; Conflict of Laws; Remedy under Federal Act; When Exclusive ¹

State of New York, Supreme Court, Ontario County.

LESLIE G. LOOMIS and LESLIE

G. LOOMIS, Jr.,

Plaintiffs,

against

LEHIGH VALLEY RAILROAD

COMPANY,

Defendant.

The plaintiffs in the above-entitled action for their complaint against said defendant herein allege:

FIRST: That during all the times hereinafter mentioned said plaintiffs were and now are co-partners, doing business at Victor, N. Y., under the firm name and style of L. G. Loomis & Son, and as such firm were and now are engaged in the business of buying, selling and handling wheat, rye, oats, apples, cabbage, potatoes, onions and other farm produce and of shipping the same in bulk over and upon the various lines of railroads owned and operated by said defendant herein, all of which said defendant was fully aware of and well knew during all the times hereinafter mentioned.

¹ From *Loomis v. Lehigh Valley R. R. Co.*, 208 N. Y. 312; mod'g and aff'g 147 App. Div. 195; 132 Supp. 138. See *ante*, page 518.

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SECOND: Said plaintiffs further allege upon information and belief that during all the times hereinafter mentioned said defendant was and now is a foreign corporation organized and existing under the laws of the State of Pennsylvania and was and is a common carrier of grain, produce, goods, merchandise and freight for hire, owning and operating various lines and branches of railroads and as such common carrier was soliciting, receiving, accepting and transporting for hire, grain, produce, freight and merchandise in bulk from Victor, Farmington, Stanley, Mendon, Henrietta, East Rush, Cedar Swamp, Rochester Junction, Clifton Springs, North LeRoy, and other places in the State of New York and to various places in the United States. That as such common carrier for hire it was the duty of said defendant to accept and receive in bulk and otherwise and to transport and deliver in a proper, careful and suitable manner wheat, oats, rye, apples, cabbage, potatoes, squash and other produce, merchandise and freight delivered or tendered to it by the plaintiffs and other persons for shipment and to furnish to these plaintiffs and other shippers proper and suitable cars and conveyances for shipment and transportation of such grain and produce over its lines and to suitably and properly equip its cars and conveyances so that the contents thereof and the grain and produce therein could be safely, quickly, conveniently and properly loaded, unloaded, examined and transported from the place where said freight was received to its destination.

That in shipping and transporting grain in bulk, in cars and by rail it is and during all the times hereinafter mentioned was necessary, proper and customary to protect said grain from wasting, leaking and spilling and to enable it to be properly loaded, unloaded, inspected and handled, to have the cars in which said grain was shipped protected and equipped with inside wooden doors called "Bindoors," that in shipping and transporting apples, potatoes, cabbage and squash in bulk in cars and by rail

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it is and during all the times hereinafter mentioned was necessary, proper and customary to protect said apples, potatoes, cabbage and squash from freezing and heating and to enable the same to be properly and suitably loaded and unloaded to have the cars in which said produce was shipped equipped and furnished with wooden bulkheads, and in carrying and transporting of any loose or bulk commodity in freight cars, it is and was necessary to use a bindoor or bulkhead in cars in which said bulk freight was shipped and transported; all of which facts and customs were well known to the defendant and of which it had full knowledge during all the times hereinafter mentioned.

THIRD: That between the 29th day of August, 1906, and the 6th day of May, 1908, both dates inclusive, these plaintiffs were obliged to and necessarily did ship in bulk over the said lines or railroad owned and operated by said defendant various quantities of wheat, oats, rye, apples, cabbage, squash and potatoes, and did pay to the defendant the proper freight and compensation therefor. That at each and all of the times said plaintiffs did deliver said freight, grain, produce and merchandise to said defendant for shipment and at and prior to the time said defendant did receive and accept the same for shipment and transportation, said defendant well knew that said grain, produce, freight and merchandise was to be shipped and transported in bulk from the said receiving station to its point of destination. That attached hereto and made a part hereof is a statement marked Schedule "A" containing a brief description of the grain and produce so delivered by the plaintiffs to said defendant for transportation and which it received and accepted for transportation, together with a statement of the places from which the said cars and freight were shipped, the places to which said freight and cars were to be delivered, the contents of each said car, the number of feet of lumber necessarily used by plaintiff in making bindoors and bulkheads for

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said cars, the value of said lumber per thousand feet and the value of the lumber so used in said bulkheads or bindoors.

Said plaintiffs further allege that at each and all the times said defendant so delivered to these plaintiffs for loading in bulk said grain and produce it neglected and refused to perform its duty as such common carrier, and it failed and refused to properly and duly deliver a car in which said grain or produce could be safely, securely, properly and suitably loaded, unloaded and otherwise properly transported, and on each and all of such occasions, it failed and refused to deliver cars properly and suitably equipped with bindoors, bulkheads or other proper and necessary protection to keep said grain loaded therein from spilling, falling out and wasting during the loading, unloading and transportation thereof or to keep the squash, potatoes, cabbage and other produce from freezing, heating or otherwise being damaged during the loading, unloading or transportation thereof. That before loading such cars and placing said grain, potatoes and other produce therein, said plaintiffs did demand of the said defendant that it properly and suitably protect said grain, potatoes, merchandise and other freight to be placed in its cars by bindoors, bulkheads or other proper and suitable protection, all of which said defendant knew to be necessary, but which it failed and refused to do. That said defendant so failing and refusing to so properly equip its said cars for the shipment of said grain and produce as set forth herein and in said statement hereto annexed, marked Schedule "A", and to furnish bindoors and bulkheads, these plaintiffs in order to protect their property during such transportation were obliged and compelled to and necessarily did purchase and furnish lumber and material necessary, proper and suitable to make such bindoors and bulkheads as were necessary and proper to protect the grain and produce during the loading, unloading, shipment, delivery and transportation

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thereof as aforesaid, and in so doing these plaintiffs did necessarily furnish and use the lumber and material set forth in said Schedule "A", hereto annexed, and as therein set forth. That said lumber and material was of the fair, actual and market value of three hundred twenty-two dollars seven cents (\$322.07), and that it was necessary to use said lumber and all of the same in so protecting the property of said plaintiffs during the shipment of said property over the lines of railway owned and operated by said defendant and as hereinbefore stated.

That by reason of the facts hereinbefore stated and set forth and by reason of said defendant so failing and refusing to deliver to these plaintiffs on demand proper and suitably equipped cars for the transportation of said grain and produce in bulk, and by reason of said defendant's failing and refusing to furnish said bindoors for the cars in which said grain was shipped and bulkheads for the cars in which said other produce was shipped, said defendant became and now is indebted to these plaintiffs for the amount of value of the bulkheads and bindoors so necessarily furnished by these plaintiffs and did become indebted to these plaintiffs for moneys necessarily paid, laid out and expended by them for it and at said defendant's request in the amount of three hundred twenty-two dollars seven cents (\$322.07), no part of which has been paid by said defendant to these plaintiffs and all of which is now due and payable.

That on or about the 5th day of February, 1907, these plaintiffs did make out a statement of the amount of the lumber so furnished by them for said bindoors and bulkheads, covering a period from the 29th day of August, 1906, to the 22d day of December, 1906, and amounting to the sum of one hundred seventy dollars twenty cents (\$170.20), and on or about the said 5th day of February, 1907, they did duly present the same for payment to said defendant, which said defendant refused to pay or any part thereof. That again and on or about

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the 12th day of September, 1907, these plaintiffs did make out and duly present to this defendant a statement of the amount of lumber used by them in making and furnishing said bindoors and bulkheads, covering a period from the 22d day of December, 1906, to June 14th, 1907, and amounting to the sum of forty-one dollars ninety-three cents (\$41.93), and did demand payment thereof, which said defendant failed and refused to pay; that on or about the 27th day of May, 1908, these plaintiffs did make out a statement of the amount and value of the lumber so used by them in making said bindoors and bulkheads covering a period from the 14th day of June, 1907, to the 6th day of May, 1908, amounting to the sum of one hundred nine dollars ninety-four cents (\$109.94) and did duly demand payment thereof of said defendant, which said defendant failed and refused to pay or any part thereof.

WHEREFORE, said plaintiffs demand judgment against said defendant for three hundred twenty-two dollars seven cents (\$322.07), with interest on one hundred seventy dollars twenty cents (\$170.20) thereof from the 5th day of February, 1907, and interest on forty-one dollars ninety-three cents (\$41.93) thereof from the 12th day of September, 1907, and interest on one hundred nine dollars ninety-four cents (\$109.94) thereof from the 27th day of May, 1908, together with the costs and expenses of this action.

JOHN COLMEY,
Plaintiffs' Attorney,
Canandaigua, N. Y.

[*Verification.*]

Attached to the Complaint was a Schedule showing upwards of 200 shipments made by the plaintiff, giving the date, the car number, the places where shipped from and where shipped to, the contents of the car and the amount of lumber used.

**FANNIE E. WILLSON, Appellant, v. FAXON, WILLIAMS &
FAXON, Respondent**

(208 N. Y. 108; rev'g 147 App. Div. 920; 131 Supp. 1151, no opinion)

Public health law; drugs and medicines; action against retail druggists representing themselves to be manufacturers of a proprietary medicine; negligence ¹

1. Where a retail dealer purchases a patented or proprietary compound or medicine from a manufacturer and then sells it under the retailer's own label as having been manufactured by him, he is just as liable to the purchaser as the actual manufacturer would have been if the purchase had been made directly from the manufacturer, for an injury suffered by the purchaser in consequence of taking poison, the presence of which is concealed in the description of the medicine as sold, under § 235 of the Public Health Law; in such a case negligence can be predicated upon the action of the retail dealer in selling medicine upon the representation of the manufacturer without taking any other means to ascertain the true character of the compound.

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 5, 1911, affirming a judgment in favor of defendant entered upon a verdict directed by the Court.

Charles Newton for appellant.

Carlton E. Ladd for respondent.

WILLARD BARTLETT, J.:

This case has been tried twice. Upon the first trial the plaintiff was successful, but the judgment entered upon

¹ For Complaint from this case, see *post*, page 550.

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the verdict in her favor was reversed by the Appellate Division, and upon the second trial, the evidence being the same, a verdict was directed in favor of the defendant. From the judgment upon that verdict the plaintiff now appeals.

The defendant is a domestic corporation engaged in selling drugs and medicines in the city of Buffalo. The plaintiff purchased at its store a box of medicinal pills labeled as follows:

“Price 25 cents

“Kascara

“Kathartics

“Cure Constipation

“Faxon, Williams and Faxon, Mfg.

“Druggists, Buffalo, N. Y.”

(On the reverse side):

“DIRECTIONS

“KASCARA KATHARTICS can be taken at any time. As a laxative EAT one tablet. For constipation, a tablet at bed time, and one before breakfast will prove satisfactory. In obstinate cases continue this treatment until cured. Children, one-quarter to one-half tablet, according to age.”

(On one side of the box):

“Stimulate the Liver,

“Invigorate the Bowels.”

(On the reverse side):

“Purely vegetable,

“Pleasantly effective.”

The plaintiff testified, and in this she was corroborated by her husband, that the defendant's clerk from whom

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she purchased the box of tablets informed her that the preparation was the same as cascara sagrada only in tablet form. She made use of the tablets, taking them as she had been accustomed to take cascara sagrada for the purpose of a laxative; but the consequences were very different from those produced by that medicine. The plaintiff developed a case of mercurial salivation, and an examination of the tablets proved that each tablet contained one-fifth of a grain of calomel combined with senna and podophyllin.

In behalf of the defendant it was proved that the tablets known as Kascara Kathartics were manufactured by Billings, Clapp & Company, wholesale druggists of Boston, Massachusetts, well known to the trade as reputable manufacturers of high grade patent and proprietary medicines; that the defendant purchased the tablets in question from these manufacturers, the goods being put up by them at the manufactory with the special label of the defendant printed thereon; and that Kascara Kathartics had been upon the market for about ten years. The quantities sold ranged from 500 to 1,000 pounds a year. From March, 1903, up to the time of the first trial in May, 1909, the defendant had sold about 900 boxes without complaint from any of its customers. It was stipulated that Kascara Kathartics was a patent or proprietary medicine and it appeared that it was not the custom of retail druggists to analyze proprietary medicines.

The Appellate Division held that the proof utterly failed to establish the negligence of the defendant because it did not know that the tablets sold to the plaintiff were dangerous and having purchased them of a long-established manufacturing concern of excellent reputation it was justified in placing reliance upon its vendor. The Appellate Division also seems to have been of the opinion that the defendant was protected by the following provision of the Public Health Law (Cons. Laws ch. 45, section 235, subd. 2: "Every proprietor of a wholesale or

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retail drug store, pharmacy, or other place where drugs, medicines or chemicals are sold, shall be held responsible for the quality and strength of all drugs, chemicals or medicines sold or dispensed by him *except those sold in original packages of the manufacturer, and those articles or preparations known as patent or proprietary medicines.*"

Where the contents of a medicine are concealed from the public generally and the manufacturer knows the contents and sells the medicine recommending its use for indicated maladies and prescribing the mode in which it shall be taken and an injury is thereby caused to a purchaser thereof, the manufacturer is liable to such purchaser for the injury which he has suffered. *Blood Balm Co. v. Cooper*, 83 Ga. 457; S. C., 5 L. R. A. 612. In the case cited it was said that the purchaser "has a right to rely upon the statement or recommendation of the proprietor printed and published to the world; and if thus relying he takes a medicine and is injured on account of some concealed drug of which he is unaware the proprietor is not free from fault and is liable for the injury thereby sustained." The liability under these circumstances grows out of the misleading concealment of a material fact, as of the composition of a medicine which the manufacturer knows or ought to know and the accompanying representation to the purchaser that he may use the preparation with safety.

In the case at bar, however, we have to deal with a sale made not by the actual manufacturer but by a corporation of retail druggists which purchased the medicine in large lots from the actual manufacturer. It being agreed that the compound sold was a patent or proprietary medicine, the corporation seeks to shield itself behind the exception in subdivision 2 of section 235 (formerly section 197) of the Public Health Law, already quoted, which, after declaring that every retail druggist shall be held responsible for the quality and strength of the drugs which he sells, excepts "those sold in original

packages of the manufacturer and those articles or preparations known as patent or proprietary medicines."

Is the benefit of this exception available to a retail druggist who holds himself out to a purchaser as the actual manufacturer of the medicine sold? I think not.

It is plain that if the sale had been made by the manufacturers themselves, Billings, Clapp & Co., of Boston, the fact that Kascara Kathartics were comprehended within the class of patent or proprietary medicines would not in anywise have absolved Billings, Clapp & Co. from responsibility for the strength and quality which of course includes the character of the compound. I think that when the defendant represented to the plaintiff by means of the statement contained in the label on the box that Faxon, Williams & Faxon were the manufacturers of the preparation it rendered itself just as liable to the purchaser as the actual manufacturers would have been if the purchase had been made from them. In other words, the defendant, by reason of this representation, became responsible to the plaintiff for the strength and quality of the preparation notwithstanding its patented or proprietary character; and, if the compound contained an injurious substance instead of being purely vegetable as the label declared, the defendant became liable in law for the injury suffered by the purchaser in consequence of ignorantly taking the concealed poison.

The case is not at all like *Thomas v. Winchester*, 6 N. Y. 397, or *Torgesen v. Schultz*, 192 N. Y. 156, where the suits were by third parties against the original manufacturer. Here the action is by a purchaser against the immediate vendor; and it is with the duties and obligations of such vendor that we are concerned. The basis of the action is the sale of a poison to a person who called for a harmless drug; and the law is well settled that in such a case evidence of negligence is necessary in order to make out a cause of action. Mere proof of the mistake is not enough in and of itself to charge the vendor with

liability. (*Allan v. State Steamship Co.*, 132 N. Y. 91; *Brown v. Marshall*, 47 Mich. 576.) The negligence which must be established to render a druggist liable in such a case as this is measured by his duty; and while this is only to exercise ordinary care, the phrase ordinary care in reference to the business of a druggist must be held to signify "the highest practicable degree of prudence, thoughtfulness and vigilance, and the most exact and reliable safeguards consistent with the reasonable conduct of the business in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicines." (*Tremblay v. Kimball*, 107 Maine, 53.) Within this rule, however, I think there was sufficient evidence of negligence to take the case to the jury. The defendant although representing itself to be the manufacturer, and, therefore, presumably acquainted with all the ingredients going to make up the medicinal preparation which it sold to the plaintiff, really knew nothing about the nature of the compound save what one of its agents had learned from Billings, Clapp & Co., to the effect that Kascara Kathartics were similar to Cascarets, and this witness admitted that he did not know what Cascarets contained. I think negligence could be predicated of the action of the agent of the defendant corporation in selling this medicine upon the representation that it was the manufacturer, without having taken any other or further means to ascertain the true character of the compound. If it could justify itself under the exception in the Public Health Law, already mentioned, it could escape liability even if the box of tablets had contained some deadly drug which had killed Mrs. Willson as soon as she took it. A construction of the statute which could lead to such results is hardly worthy of serious consideration.

If I am right in the views which have been expressed the judgment should be reversed and a new trial granted, with costs to abide the event.

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CULLEN, Ch. J., GRAY, WERNER, CHASE and HOGAN, JJ., concur; COLLIN, J., dissents.

Judgment reversed, etc.

Form No. 52

Complaint; Public Health Law; Drugs and Medicines; Action against Retail Druggists Representing Themselves to be Manufacturers of a Proprietary Medicine; Negligence ¹

Supreme Court, Monroe County.

Fannie E. Willson, Plaintiff, against Faxon, Williams and Faxon, Defendant.	}
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The plaintiff above-named for her complaint against the above-named defendants, by Newton and Gerrodette, her attorneys, alleges:

I. That at all times hereinafter mentioned the defendant was and still is a domestic corporation organized and existing under and pursuant to the laws of the State of New York, and engaged, among other lines in the business of selling drugs and medicines in the City of Buffalo, County of Erie and State of New York.

II. That heretofore and on or about the 21st day of January, 1905, this plaintiff and her husband, Porter J. Willson, were together in defendant's store in said City of Buffalo, N. Y., and that at said time and place said Porter J. Willson purchased from the defendant for this plaintiff at her request, a box of medicinal pills; that at the time said purchase was made this defendant stated

¹ From *Willson v. Faxon, Williams and Faxon*, 208 N. Y. 108; 147 App. Div. 920; 131 Supp. 1151. See *ante*, page 544.

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and represented to this plaintiff that the pills so sold were a harmless vegetable remedy for constipation and that they contained no poisonous or other deleterious ingredients; that said pills were purchased for the purpose of being administered to and taken by this plaintiff as a medicine for the cure of constipation, which fact was well known to this defendant.

III. That said pills so sold as aforesaid were not purely vegetable and did contain harmful and poisonous ingredients, to wit, bi-chloride of mercury and other deleterious mineral poisons in sufficient quantities to make the taking and use thereof dangerous and injurious to the health of this plaintiff.

IV. That hereafter this plaintiff did take a quantity of these said pills according to the directions furnished therewith; that as a consequence thereof this plaintiff was seriously poisoned and made seriously ill and seriously injured and rendered sick and disordered during her life time and the plaintiff has and will permanently during her life time continue to suffer and undergo great pain and suffering; and has been hindered and prevented from performing her necessary affairs and duties and was confined to her bed for a long period of time, and also thereby this plaintiff was forced and obliged and did necessarily pay, lay out and expend a large sum of money in medical, surgical and dental expenses, in treating the said injuries and disorders in the effort to be cured and relieved therefrom, at an expense in excess of two hundred dollars, and will in the future be obliged to expend large sums of money for such treatment as aforesaid.

V. That said pills were sold to this plaintiff and this plaintiff was so poisoned and injured as aforesaid as the result of the wilful carelessness and negligence solely of this defendant and without any carelessness or negligence on the part of this plaintiff.

VI. That at the time of the purchasing of said pills as aforesaid and the taking of the same by this plaintiff,

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this plaintiff relied upon the statements and representations of the defendant to the effect that said pills were perfectly harmless, purely vegetable and contained no deleterious substance, which said statements were wholly false as aforesaid.

VII. That in consequence of the matters and things hereinbefore set forth this plaintiff has suffered damage in the sum of twenty-five thousand dollars.

WHEREFORE plaintiff demands judgment against the defendant for said sum of twenty-five thousand dollars (\$25,000.00) damages, with costs of this action.

NEWTON & GERRODETTE,
Attorneys for Plaintiff,
902 D. S. Morgan Bldg.,
Buffalo, N. Y.

[Verification.]

State of New York, }
County of Erie, } ss:
City of Buffalo. }

Frank H. Gerrodette, being duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true; that the grounds of deponent's belief and the sources of his information as to all matters not stated upon his own knowledge are derived from conversations had with the plaintiff and sworn statements of the plaintiff and letters received from the plaintiff and others which are now in deponent's possession and personal investigations made by deponent.

FRANK H. GERRODETTE.

Sworn to before me this 14th day of September, 1907.

Maude Birdsey, Commissioner of Deeds,
Buffalo, N. Y.

HAROLD A. ANDREWS, Plaintiff, v. ALBERT HAAS and
others, Defendants

(Supreme Court, Kings County Special Term, November 11, 1913)

**Attorneys; action on contract for percentage of recovery when
clients have refused to proceed with the action**

1. Where a client has agreed with an attorney to pay such attorney a percentage of any recovery which may be had in an action, and after the attorney has prepared the complaint the client verifies the same but refuses to deliver it to the plaintiff and refuses to go on with the action, and no action is ever brought or recovery had, the attorney cannot recover from the client the percentage of the claim specified in the agreement but can recover on a *quantum meruit* only for the services actually performed.

Motion to dismiss complaint on the opening of counsel.
Granted.

Harold A. Andrews for the plaintiff in person.

Eppstein & Rosenberg for the defendants.

BENEDICT, J.:

This is an action by an attorney upon an alleged contract of employment. A motion was made to dismiss upon the opening of counsel. The complaint sets forth that the defendants retained the plaintiff to bring a suit against a corporation for \$180,000, and agreed to pay him "for his services 25 per cent. of the amount recovered therein"; that plaintiff prepared and submitted a complaint to the defendants, which they verified, but which they declined to give to plaintiff; that defendants refused to further prosecute the action, although plaintiff requested them to do so, and that there is due and owing to plaintiff \$45,000, no part of which has been paid, and judgment is demanded

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for that amount. In my opinion the complaint does not state a cause of action. The action is not on a *quantum meruit* for the reasonable value of services rendered, but for the compensation which plaintiff claims he would have earned had he been permitted to perform his contract. He relies upon several authorities which have held that an attorney retained to prosecute a claim for a percentage of the recovery is entitled to maintain an action for such percentage if his client breaks the agreement and employs some other attorney to prosecute the claim. *Marsh v. Hollbrook*, 3 Abb. Ct. App. Dec. 176; *Lawson v. Bachman*, 81 N. Y. 616; *Grapel v. Hodges*, 112 N. Y. 419; *Matter of Robbins*, 189 N. Y. 422; *Carlisle v. Barnes*, 102 App. Div. 573; 92 Supp. 917; *Matter of Albers Realty Co.*, 140 App. Div. 277; 125 Supp. 179. But in all these cases there was an actual recovery upon which the percentage could be computed. In the case at bar, on the other hand, it is not alleged that there has been any recovery upon the claim which plaintiff alleges he was employed to prosecute, and hence there is no basis upon which to fix the amount to which he would be entitled should he prove the contract and its breach. Doubtless he could recover the value of the services actually rendered at defendants' request upon a *quantum meruit*, but he does not bring his action in that form. Complaint dismissed.

MITTELDEUTSCH PRIVATE BANK A. C., Plaintiff, v. MATHILDE BOSSELMAN, ALDREAS C. BOSSELMAN and ANDREAS BOSSELMAN & Co., Defendants.

(Supreme Court, N. Y. Special Term, Part 1, October 3, 1913)

Answer; denials in special defenses; striking out such denials to permit plaintiff to demur

1. Where denials in separate defenses are unnecessary to such defenses they should be stricken out on motion, so as to per-

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mit the plaintiff to raise the question of the sufficiency of such a defense by demurrer, for the reason that while such denials are contained in such defenses the sufficiency of the defenses cannot be tested on demurrer.

Motion to strike out denials from such defenses in the answer.

Granted.

Cardozo & Englehand for the plaintiff.

Herman L. Lurie for Mathilde Bosselman.

Rudolph Marks for A. C. Bosselman & Co.

BIJUR, J.:

Motion to strike out from a separate defense denials of certain allegations in the complaint. The purpose of plaintiff, if the motion is granted, is to demur to the defense. There is much force in the argument that a denial has no place in a separate defense under our system of pleading. If the matter in the complaint which is denied is immaterial the denial is useless and should be disregarded entirely. If the matter denied is material to the cause of action, proof supporting the special denial would be given under the general denial and thus of itself defeat the cause of action at the outset. Following out this line of reasoning, denials in a separate defense have been held to be no bar to a demurrer to the defense. *Stern v. Marcuse*, 119 App. Div. 478; 103 Supp. 1026; *Staten Island Midland R. v. Hinchcliffe*, 34 Misc. 49; 68 Supp. 556. I am constrained, however, to follow the rule adopted in his department under which such denials seem to have been recognized as proper in some cases (see *Mendelson v. Margulies*, 157 App. Div. 666; 142 Supp. 825), and in consequence of which, therefore, denials held to be unnecessary must be stricken out before a demurrer may be interposed to the de-

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fense in which they are contained. In the case at bar the denials against which the present motion is directed are manifestly unnecessary and must be stricken out. Motion granted. Settle order on notice.

In the Matter of the Proceeding Supplemental to Execution by THE GERMAN EXCHANGE BANK, Plaintiff and Judgment Creditor, v. JOHN SCHEIDIG & Co., Defendant and Judgment Debtor

(City Court of the City of New York, September 16th, 1913)

Corporation; supplementary proceedings after dissolution; waiver of a defect in papers by appearing and consenting to adjournment

1. Proceedings supplemental to execution may be enforced against a corporation even though it has been dissolved in voluntary proceedings.¹
2. The objection to the sufficiency of papers in supplementary proceedings is waived by the appearance of the defendant and consenting to an adjournment of the examination.

Motion to set aside order for examination of corporate defendant in supplementary proceedings.

Denied.

Steiner & Petersen (Joseph H. Kohan of counsel), for the plaintiff and judgment creditor.

¹ The judgment upon which the supplementary proceeding was based was obtained on March 12th, 1913, in the Municipal Court, Borough of Manhattan, First District, for the sum of \$287.17. The corporation was dissolved in voluntary proceedings on January 8, 1913.

It is held that the assignment for the benefit of creditors by a judgment debtor does not prevent his being examined in supplementary proceedings. *Matter of Rutaced Co.*, 137 App. Div. 716; 122 Supp. 454.

Lewis Schuldenfrei for the defendant and judgment debtor.

DELEHANTY, J.:

The motion to vacate is denied, with \$10 costs. The objection to the sufficiency of the supplemental papers has been waived by the appearance of the defendant herein and consenting to the adjournment of the proceedings and examination. *Becker v. Gerlich*, 72 Misc. 157; 129 Supp. 614. The second objection, that the dissolution of the defendant corporation was a bar to an action against it and a subsequent examination in supplementary proceedings thereunder, is untenable for the reason that the statute provides that though dissolved the existence of a corporation is continued expressly for the purpose of the payment of its debts, and that it may sue and be sued accordingly. General Corporation Law, sec. 221, subdiv. 3; see also *Cunningham v. Glauber*, 133 App. Div. 10; 117 Supp. 866; *Myers v. Montgomery*, 130 Supp. 133. Let the proceedings be continued under the original order on Saturday, September 20, at 10 A.M. Order filed.

BERTHA S. ALSOP, Plaintiff, v. EDMUND C. ALSOP, Defendant

(Supreme Court, New York Trial Term, Part 2, November 11, 1913)

Alimony; enforcement of foreign judgment when foreign law permits modification of decree

1. A foreign decree of divorce awarding alimony to a wife can be enforced in this State under the full faith and credit clause of the Federal Constitution, to the extent of alimony already due and unpayable, unless it appears that by the law of the foreign State such a decree is subject to modification as to

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the amount of alimony already due and payable, in which latter event the decree cannot be enforced in this State.

Joseph Levy for the plaintiff.

Holter, Ingalls & Guthrie for the defendant.

PLATZKE, J.:

Judgment for the defendant upon the merits and upon the authority of section 139, Civil Code of California, and *Cohen v. Cohen*, 150 Cal. 99; 88 Pac. R. 267; construing said section. The California Code cited indicates that the courts of that State have power to modify and amend the terms of a decree such as is sought to be enforced herein. In *Sistare v. Sistare*, 218 U. S. 1, it is held that a decree for the future payment of alimony is, as to installments past due and unpaid, within the protection of the full faith and credit clause of the Federal Constitution, *unless by the law of the State in which the decree was rendered its enforcement is so completely* within the discretion of the courts of that State that they may annul or modify the decree, even as to overdue and unsatisfied installments. An exhaustive note appearing at the foot of *Israel v. Israel* (reported in 9 L. R. A., N. S., 1168) states the general rule applicable to the case at bar as follows: "While there is no doubt that a decree for alimony for a gross sum payable presently is a debt of record entitled to full faith and credit in other States under the provisions of the Federal Constitution and therefore enforceable in other States (*Lynde v. Lynde*, 181 U. S. 183; 45 L. Ed. 810; 21 Sup. Ct. Rep. 555, affirming 162 N. Y. 412; 48 L. R. A. 679; 76 Am. St. Rep. 332; 56 N. E. 979), it is now thoroughly established that a judgment for future alimony or maintenance, which either by its own terms or by the laws of the State in which it is rendered, is subject to modification as to amount by the court rendering it, is not even as to installments which have accrued before the bringing of an action in another State to en-

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force the same, a final judgment entitled to full faith and credit in other States under the provision of the Federal Constitution."

ROBERT J. MITCHELL, Plaintiff, v. THE DAVIS AND FARNUM MFG. Co. et al., Defendants

(Supreme Court, Kings County Special Term, November 12, 1913)

Service of summons on foreign corporation; managing agent; engineer in charge of work

1. Where a foreign corporation which had not designated a person upon whom process might be served was engaged in the construction for the City of New York of a pumping station in the County of Kings, and had in its employ an engineer to look after its interests in the erection of said plant, who had authority to exercise judgment and discretion in relation to the progress of the work and was the only person who had such authority in charge of the work, it was held that he was a managing agent within the meaning of the Code of Civil Procedure upon whom a summons might be served in an action against a foreign corporation.¹

Motion to set aside service of summons.

Denied.

Burlingame & Sheffield for the plaintiff.

James B. Henney for the defendant The Davis and Farnum Mfg. Co.

¹ The defendant corporation was organized under the laws of the State of Massachusetts and did not do business in this State and had no office of any kind in New York. The engineer in charge of the work employed such men as he needed and one of them was Mitchell, the plaintiff in the action, and in the course of the work Mitchell was injured. It was in an action for these personal injuries that the service of the summons was made on the engineer, addressed to the company.

No appeal was taken from the order entered on this decision.

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MADDOX, J.:

The defendant foreign corporation has not had and now has no legally designated agent in this State upon whom process might be served. In February, 1911, it was engaged in the construction for the City of New York of a pumping station in this county and had in its employ the person upon whom the service was made "as an engineer to look after its interests in the erection of said plant." If that was the scope of the employment, then it was broad indeed, and upon any occasion when the exercise of judgment and discretion was necessary for its corporate interest or benefit the engineer was the only person to act. Undoubtedly the performance of a contract for the erection of a pumping plant for a large municipality involves many considerations affecting the interests of the construction contractor, and it appears here that the engineer was to "look after its interests." Again, it appears that such engineer was employed "to look after its interests in pumping operations at said plant" (see affidavit of Brown, treasurer of the corporation). It is not necessary that the person shall be designated as general manager; it is sufficient, whatever his title may be, if he is "invested with general powers involving judgment and discretion. * * *" *Taylor v. Granite State Provident Ass'n*, 136 N. Y. 343, 346. Motion denied, with \$10 costs.

JOHN J. BRENTZ, Plaintiff, v. THE CROTONA PARK REALTY
COMPANY and IGNAZIO SILLITTI, Defendants

(Supreme Court, N. Y. Special Term, Part I, June 16, 1913)

Substituted service of summons on domestic corporation

1. Where it appeared that the only office of a domestic corporation in the city was the residence of the president, that many efforts to serve the president had been unsuccessful, for the

Opinion of the Court

reason that he denied himself to process servers and had avoided service, it was held that substituted service might be made on the corporation under the provisions of § 435 to § 437 of the Code of Civil Procedure.

Motion to vacate lien by reason of alleged insufficiency of service of summons on domestic corporation.

Denied.

H. J. O'Connell for the plaintiff.

John B. Coppola for Crotona Park Realty Co., specially.

GIEGERICH, J.

The claimant obtained an order for substituted service against the alleged owner, the Crotona Park Realty Company, by virtue of which it was served with a copy of the summons. It is urged by the latter that under sections 435 to 437 of the Code of Civil Procedure, service of the summons can be made only personally or by publication. It was held, however, in *Clarke v. Lockard* (122 N. Y. 263) that substituted service in the manner prescribed by those sections was equivalent to a service by publication. The alleged owner also contends that substituted service will not avail the claimant, because substituted service cannot be had against a corporation, the alleged owner being a domestic corporation. The case of *Hahn v. Anchor Steamship Co.* (2 City Ct. Rep. 25) is cited in support of the contention. In that case, Mr. Justice McADAM refused to grant an order for substituted service. No facts are stated except such as may be inferred from the following brief statement: "That a corporate body can conceal itself with intent to avoid the service of process not only imports marvelous ingenuity to the officers of the steamship company, but somewhat exaggerated perhaps their hiding and obscuring capacity.

Opinion of the Court

The application for a substituted service of the summons is declined on the ground that legislative sense of civil remedies is not yet liberal enough to extend the process to the case presented." It will be seen from the foregoing extract that the justice did not lay down a rule of the sweeping character claimed by the owner, but confined the grounds of the denial to the case in hand as presented. Neither did it appear in that case, as was shown in subsequent cases, that a single individual owned the bulk of the stock of the corporation and that he in reality was the corporation itself. *Matter of Rieger, Kapner & Altmark*, 157 Fed. Rep. 609; *Cawthra v. Stewart*, 59 Misc. 38; 109 Supp. 770. That the alleged owner is a corporation of the latter description may be fairly inferred from the following uncontradicted allegations of the opposing affidavit, viz: "That the above named defendant, Crotona Park Realty Company, has no office address in the City of New York, other than at the residence of Cesare Pianisani, its president, No. 2144 Belmont avenue, Bronx Borough, New York City. That as many as twenty efforts, at least, were made to serve the said Pianisani with summons and complaint herein, but that he has denied himself to the process servers and has avoided service. No other office of the said corporation defendant, Crotona Park Realty Company, can be found within this State." The foregoing facts, in my opinion, amply warranted the granting of the order for substituted service. It is now in full force, and due effect must be given to it until it is set aside. In this view, service of the summons under the order in question was sufficient. The motion to vacate the lien herein is therefore denied, with \$10 costs. Settle order on notice.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of FRANCIS R. HITCHCOCK, to THE OFFICERS OF THE UNION FERRY COMPANY OF NEW YORK AND BROOKLYN.

(Supreme Court; Kings County Special Term, September 24, 1913)

Mandamus; issuance of amended writ after demurrer has been sustained to original writ; notice

1. Where a demurrer has been sustained to a writ of mandamus an amended writ cannot be issued *ex parte*, but notice thereof must be given to the respondent.¹

Motion to quash writ of mandamus.

Granted.

Wood, Cooke & Seitz, attorneys for relator.

Forster, Hotelling & Klink, attorneys for respondents.

KELLY, J.:

The amended writ of mandamus could only be issued on application to the court (sec. 2080, Code C. P.) and upon notice of application given to the respondents (Code, sec. 2067, as amended 1913). Concededly neither of these requirements has been complied with. The hearing before Justice CRANE was upon a demurrer to the original writ, which he sustained. A new application upon notice was therefore necessary. I am inclined to believe that the Special Term could grant this amended writ if it were properly applied for. The relator originally applied for the writ at Special Term, and his application was denied. The Appellate Division reversed the order and directed the issuance of an alternative writ. Granted that the

¹ Subsequently the relator applied for an amended writ which was granted and no appeal was taken in the matter.

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Appellate Division might have issued the writ, attested by the presiding justice and sealed with the seal of that court, I think it was also proper for the Special Term, upon presentation of the order of the Appellate Division, to issue the writ and carry into effect the judgment of the Appellate Court. But the demurrer to the writ thus issued having been sustained for the reasons stated by Mr. Justice CRANE in his memorandum of August 27, 1913, the amended writ could not be issued *ex parte*. The respondent's objections are technical and they appear to have no compunctions about admitting the fact, but I cannot see how I can avoid the objections. The motion to quash the amended writ is therefore granted, with \$10 costs, without prejudice to the relator's right to apply for an alternative writ as directed by the Appellate Division upon payment of costs.

HANS MAHLER COMPANY and EMILY MAHLER, Plaintiffs,
v. HANS MAHLER and MALDURMIN IMPORTING Co.,
Defendants

(Supreme Court, N. Y. Special Term, Part I, June 16, 1913)

**Injunction; undertaking; motion to cancel after judgment in
favor of the plaintiff while appeal is pending**

1. Where the plaintiff secured a temporary injunction and the trial resulted in a judgment in favor of the plaintiff against the defendants on the merits, and one of the defendants had appealed to the Appellate Division and executed an undertaking on such appeal; *held*, that while the appeal was pending a motion to cancel the undertaking given by the plaintiff as a condition of securing the temporary injunction was premature and must be denied.¹

¹ There appears to be no other adjudication directly in point in this State on the question decided in the case in the text. In the authorities cited by Mr. Justice GIEGERICH the question did not arise upon ap-

Opinion of the Court

Motion to cancel undertaking given on securing temporary injunction.

Denied.

Paul Gross for the plaintiffs.

Reigelman & Bach for the defendant Hans Mahler.

Fulton McMahon for the defendant Maldurmin Importing Co.

GIEGERICH, J.:

The plaintiffs apply to cancel the undertaking given by them as a condition to the granting of a temporary injunction. A trial of the action has resulted in a judgment in favor of the plaintiff against the defendants on the merits, and the defendant Hans Mahler has appealed to the Appellate Division. The condition of the undertaking is "that the plaintiffs will pay to the defendant Hans Mahler, so enjoined, such damages, not exceeding the beforementioned sum, as he may sustain by reason of the injunction if the court finally decides that the plaintiffs were not entitled thereto." This is in conformity with the provisions of section 620 of the Code of Civil Procedure, and the courts in construing the same or similar ones under section 222 of the old Code have held that there is no final decision while an appeal is pending. *Ninth Ave. R. R. v. N. Y. Elevated R. R.*, 3 Abb. N. C. 22; *Musgrave v. Sherwood*, 76 N. Y. 194. In the case last cited the court, at page 195, said: "The plaintiff having appealed and

plications to cancel the undertakings, but upon motions by the defendants to assess the damages after judgments had been entered in favor of such defendants and appeals had been taken therefrom by the plaintiffs. The attorneys for the defendant Mahler cited one case in point from Ohio, which was in entire harmony with the decision made by Mr. Justice GIEGERICH in the case in the text; to wit, the case of *Williams v. Baker*, 7 Ohio Cir. Ct. Dec. 515.

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executed the proper undertaking, it cannot be claimed that there has been a final determination of the cause. *Palmer v. Foley*, 71 N. Y. 106. It still remains undetermined and the final result cannot be known until the appellate tribunal has passed upon the case." This motion is therefore premature and must be denied, with \$10 costs, with leave to renew upon payment of such costs in case there is a final determination of the action in favor of the plaintiffs. Settle order on notice.

FLOSSIE STONE, Plaintiff, v. WALTER T. STONE, Defendant ¹

(City Court of the City of New York, November 12, 1913)

Husband and wife; separation agreement; action on; defense that wife has committed adultery since making of agreement

1. In an action on a separation agreement a defense that the plaintiff has committed adultery since the agreement was made, is not sufficient, unless such conduct on the part of the wife constitutes a specific breach of the contract.
2. Where such a contract contained a provision that each of the parties would "not interfere with the rights, privileges, doings or actions of each other" it was held that such provision was violated by the commission of adultery by the wife and such violation precluded a recovery under the contract.

Demurrer to three separate defenses.

Overruled as to one and sustained as to two such defenses.

Gilbert & Wessell, attorneys for the plaintiff.

John R. Little, attorney for the defendant.

¹ See case of *Brockelbank v. McAdam*, *ante*, page 53, and complaint from that case at page 54.

O'DWYER, C. J.:

The statement of facts contained in the first separate defense is to the effect that the defendant has paid a part of the moneys claimed by the plaintiff in this action, and should have been interposed as a partial and not as a complete defense. The second separate defense is bad. There is no provision in the agreement rendering it void as against public policy. The demurrer to the third separate defense presents the question whether or not the plaintiff violated a material stipulation in the agreement of separation, it being alleged by the defendant that subsequent to the execution of that agreement the plaintiff committed adultery on several occasions. It appears to have been decided in the cases of *Galusha v. Galusha* (116 N. Y. 635) and *Clark v. Fosdick* (118 N. Y. at page 7), that where a husband and wife enter into articles of separation, valid when made, that the subsequent adultery of the wife in the absence of a stipulation to the contrary in the articles of separation does not prevent her from recovering installments accruing thereunder after the commission of such adultery. That such is the effect of the decisions in those cases is clearly expressed in the dissenting opinion therein of Chief Judge FOLLETT (reported in 118 N. Y. at page 18). Subsequent to the decision in the cases cited above it has been held in the case of *Roth v. Roth* (77 Misc. 673; 138 Supp. 573) that the adultery of the wife subsequent to the making of the agreement is a defense to an action thereon, and this decision appears to have been followed by Judge Luce in the case of *Randolph v. Field* (reported in the New York Law Journal on July 8, 1913, at page 1812). In deciding the question presented herein I have concluded that the law as declared by the Court of Appeals is still the law with respect to contracts of separation between husband and wife, and that action upon such agreements by the wife may only be defeated because of the breach of one or more of the provisions thereof, so that in this case the question to be determined

is whether or not the adultery alleged to have been committed by the wife subsequent to the making of the agreement violates any of the provisions thereof, and I believe that it does. The agreement provides: "In consideration of the payments to be made as hereinafter provided by the party of the first part to the party of the second part, the parties agree that they will live separate and apart; that each of them *will not interfere with the rights*, privileges, doings or actions of each other, or in any way interfere with, bother, annoy or in any manner cause each other any trouble or annoyance in the future." The wife, after a separation, retains the character of a married woman, and by her separation acquired no right to commit adultery. The commission of such an act is an undoubted interference with the rights of the husband acquired at the time of the marriage that continue until its dissolution, even though the enjoyment thereof has been lost to him by reason of the separation, in that it is destructive of his exclusive and sole right to sexual intercourse with her so long as the marriage shall endure. Inasmuch as this plaintiff agreed not to interfere with any of the defendant's rights, her default in that regard amounts to a breach of the contract, and will relieve the husband from any liability thereunder subsequent to the alleged breach. The demurrer to the third defense is held to be bad, and overruled. Demurrer to the first and second defenses sustained and to the third defense overruled, with leave to defendant to serve an amended answer. No costs. Settle decision and findings on two days' notice.

MARY LUDLAM, Plaintiff, v. CLARA BLOODGOOD, HENRY A. LUDLAM and HARRIET S. LUDLAM, Defendants ¹

(Supreme Court, Kings County Special Term, October 17, 1913)

Creditor's action to set aside alleged fraudulent transfer of property, in action by wife, in whose favor order for alimony has been made; pleading; demurrer; complaint

1. A wife, in whose favor an order for alimony has been made, in an action for divorce, and to enforce which an order to punish the defendant for contempt has been made, which latter order the defendant evades by remaining without the State, can maintain a creditor's action against the defendant and those to whom he has fraudulently transferred property without showing that an execution against the property of the husband has been returned unsatisfied.²

Demurrer to the complaint.

Overruled.

Burnstine & Geist, attorneys for plaintiff.

J. Bradley Tanner, attorney for defendant Bloodgood.

GARRETSON, J.:

I think this action, in form, maintainable under the general equity powers of the court; that it is not controlled

¹ Aff'd without opinion by the Appellate Division of the Second Department, April 3, 1914. See 000 App. Div. 000; 146 Supp. 1098.

For complaint from this case see *post*, page 570.

² On the appeal to the Appellate Division from the interlocutory judgment overruling the demurrer to the complaint the plaintiff's attorneys cited as authorities for the proposition that a creditor's action could be maintained without the necessity of showing that an execution had been returned unsatisfied, the following cases: *Thayer v. Thayer*, 145 App. Div. 268; 129 Supp. 1035; *Kamp v. Kamp*, 46 How. Pr. 143; *McGlynn v. McGlynn*, 37 Misc. 12; 74 Supp. 744; *Aldridge v. Walker*, 73 Hun, 281; 26 Supp. 296; *Berber v. Berber*, 21 How. (U. S.) 582.

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by the conditions precedent to the right of a judgment creditor to sue to set aside a conveyance made in fraud of creditors, as prescribed by the Code of Civil Procedure. The plaintiff has exhausted her remedy in the divorce action. The order adjudging defendant husband in contempt (which he evades by keeping out of this State) necessarily involves a finding that said husband has no property which can be reached upon an execution. Judgment for plaintiff, with costs, with leave to defendants Ludlam to answer in twenty days on payment of costs.

Form No. 53

Complaint; Creditor's Action to Set Aside Alleged Fraudulent Transfer of Property, in Action by Wife, in whose Favor an Order for Alimony has been made ¹

Supreme Court, Kings County.

MARY LUDLAM,	}
Plaintiff,	
against	
CLARA BLOODGOOD, HARRIET	
S. LUDLAM and HENRY A.	
LUDLAM,	
Defendants.	

Plaintiff, by her attorneys, Burnstine & Geist, for her amended complaint in this action, respectfully shows to this Court as follows:

FIRST: That in an action for separation, pending in the Supreme Court of the State of New York, in the County of New York, wherein this plaintiff as wife, is plaintiff, and the defendant Henry A. Ludlam, her husband, is defendant, an order was duly made and entered by that Court on or about the 6th day of March, 1901, directing the said defendant Henry A. Ludlam, to pay to the plain-

¹ From *Ludlam v. Bloodgood*, see *ante*, page 569.

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tiff herein the sum of \$125 monthly beginning the 11th day of March, 1901, as alimony for the support of herself and the children of said plaintiff and said defendant, and that said order was at all the times herein mentioned and still is in full force and effect, and by virtue thereof this defendant was at all times herein mentioned and still is directed and obliged to pay to this plaintiff the sum of \$125 monthly as alimony for the support of herself and children aforesaid.

SECOND: That for more than four years last past, the defendant Henry A. Ludlam has failed, neglected and refused to comply with the directions contained in the said order, and has failed, neglected and refused to pay plaintiff any part of the said alimony due and payable thereunder during said period, and still refuses to pay said alimony, and that there is now due and owing to plaintiff from said defendant by virtue of the terms thereof, more than \$5,500, together with interest thereon.

THIRD: Upon information and belief that heretofore and in or about the year 1911, the defendant Henry A. Ludlam brought an action in the courts of the State of Nevada to procure an absolute divorce against this plaintiff, and that in said action the said Court rendered a judgment which purported to dissolve the marriage existing between the plaintiff and the said defendant Henry A. Ludlam.

FOURTH: Upon information and belief that said alleged decree of divorce was and is irregular, null and void, in that defendant Henry A. Ludlam was not at that time a bona fide resident of Nevada, but of New York, and that plaintiff was not served with process in said action within the State of Nevada, or appeared in said action, or in any manner gave said Court jurisdiction.

FIFTH: Upon information and belief that thereafter and in or about the same year the defendant Henry A. Ludlam attempted to marry the defendant Harriet S. Ludlam.

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SIXTH: Upon information and belief that the defendant Henry A. Ludlam ever since the said alleged marriage to the defendant Harriet S. Ludlam, has lived and cohabited with her and is now living and cohabiting with her.

SEVENTH: That heretofore, in the said separation action pending in the Supreme Court, New York County, between the said plaintiff and the defendant Henry A. Ludlam, and in or about the month of September, 1912, an order was duly made and entered adjudging defendant Henry A. Ludlam guilty of contempt of Court for failure to obey the orders and mandates of this Court in that he refused to pay alimony due by virtue of the terms and conditions of the order made in the said action on or about the 6th day of March, 1901, and directing that a warrant of commitment issue to any Sheriff in any County of the State of New York, to apprehend and keep in close custody the defendant Henry A. Ludlam, until he comply with the said order of the said Court, or be discharged according to law.

EIGHTH: Upon information and belief that at or about said time, with the intention to avoid and evade the process of the said Court, the defendant Henry A. Ludlam and the defendant Harriet S. Ludlam fled the jurisdiction of the said Court and the State of New York, to the City of Newark, in the State of New Jersey, where they ever since then resided, and now reside, and by reason thereof the said warrant of commitment has never been executed.

NINTH: Upon information and belief, that heretofore and on or about the 10th day of September, 1907, the defendant, Henry A. Ludlam and the defendant, Clara Bloodgood, entered into a certain agreement, under the terms of which, it was provided that certain premises then about to be purchased by the defendant Henry A. Ludlam, mentioned and described hereinafter, should be purchased by him in the name of the defendant, Clara Bloodgood, with moneys belonging to and furnished by the defendant, Henry A. Ludlam and that the said Clara

Complaint

Bloodgood, should hold said property in trust and for the benefit of this defendant, Henry A. Ludlam, and that upon his request, she should make, execute and deliver a deed of conveyance of the said property to whomsoever this defendant Henry A. Ludlam would direct, and that said agreement was made by said parties for the purposes and with the intent hereinafter set forth.

TENTH: That thereafter and on or about the 10th day of September, 1907, one Harry Hansen and his wife, Anna, by deed of conveyance, transferred and conveyed to Clara Bloodgood the fee simple of premises mentioned and described hereinafter by deed of conveyance filed and recorded in the office of the Registrar of the County of Kings on the 17th day of September, 1907, in Section 16, Block 5194, Liber 3039, page 143. That the said premises are described as follows:

“BEGINNING at a point on the easterly side of East 28th Street, distant one hundred sixty (160) feet southerly from the corner formed by the intersection of the easterly side of East 28th Street with the southerly side of Clarendon Road; running thence easterly parallel with Clarendon Road and part of the distance through a party wall one hundred (100) feet to the centre line of the Block between East 28th and 29th Streets; thence southerly along said centre line of the block twenty (20) feet; thence westerly, again parallel with Clarendon Road one hundred (100) feet to the easterly side of East 28th Street and thence northerly, along the easterly side of East 28th Street, twenty (20) feet to the point or place of beginning.”

ELEVENTH: Upon information and belief, that said deed of conveyance was made, executed and delivered by the said Henry Hansen and his wife, Anna, to said Clara Bloodgood, pursuant to the arrangement hereinbefore set forth and then existing between the said defendants, Clara Bloodgood and Henry A. Ludlam, and in consideration of moneys paid by the defendant Henry A. Ludlam therefor.

TWELTFH: Upon information and belief, that the de-

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fendant Clara Bloodgood paid no part of the consideration for the said deed of conveyance.

THIRTEENTH: Upon information and belief, that at the time that the said deed of conveyance was made, executed and delivered, as aforesaid, the defendant Henry A. Ludlam was insolvent and did not have sufficient property to pay his debts, and that at that time he was indebted to this plaintiff in a sum exceeding one thousand (\$1000) Dollars, which said facts were then well known to the defendant, Clara Bloodgood.

FOURTEENTH: Upon information and belief, that the defendant Henry A. Ludlam, entered into the said agreement and arrangement as aforesaid with the express purpose and intent of hindering and delaying his creditors, and particularly this plaintiff, and to avoid the payment of the moneys directed to be paid to the plaintiff herein, under and by virtue of the order for alimony mentioned herein, and that these facts set forth herein were well known at that time to the defendant, Clara Bloodgood.

FIFTEENTH: Upon information and belief that during the entire period the defendant Clara Bloodgood had title to said property as set forth herein, she held the same as trustee and for the benefit of the defendant Henry A. Ludlam, and that he was then and still is the real owner thereof.

SIXTEENTH: That thereafter and on or about the 4th day of November, 1911, the defendants entered into an agreement under the terms of which it was provided that the defendant, Clara Bloodgood, should, by deed of conveyance, transfer and convey to the defendant, Harriet S. Ludlam, the fee simple of said premises for the purposes mentioned herein, and with said intent, and that said defendant Harriet S. Ludlam should hold the said property in trust and for the benefit of this defendant Henry A. Ludlam, and upon his request, to make, execute and deliver a deed of conveyance of said property to whomsoever this defendant Henry A. Ludlam would direct.

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SEVENTEENTH: Upon information and belief, that at the time of the making of the said agreement and the time of the conveyance hereinafter mentioned and described, the defendant Harriet S. Ludlam knew all the facts set forth hereinabove.

EIGHTEENTH: That thereafter and pursuant to said last mentioned agreement and on or about the 4th day of November, 1911, the defendant Clara Bloodgood, by deed of conveyance, transferred and conveyed to the defendant, Harriet S. Ludlam, the fee simple of said premises mentioned and described herein and said deed was filed and recorded in the office of the Register of the County of Kings on the 6th day of February, 1912, in Section 16, Block 5194, Liber 3352, page 71.

NINETEENTH: Upon information and belief that the said deed of conveyance was made, executed and delivered by the said Clara Bloodgood to the said defendant Harriet S. Ludlam without any consideration paid by the said Harriet S. Ludlam to either the defendant Henry A. Ludlam or to the defendant Clara Bloodgood or both.

TWENTIETH: Upon information and belief, that said deed of conveyance was made, executed and delivered by the said defendant Clara Bloodgood to the said defendant Harriet S. Ludlam with the intent and purpose of hindering and delaying the creditors of Henry A. Ludlam and particularly this plaintiff and to avoid the payment to plaintiff of the alimony directed to be paid by him under the order mentioned herein.

TWENTY-FIRST: Upon information and belief, that at the time of the making of said last mentioned agreement between the defendants and at the time the said last mentioned deed of conveyance was made, executed and delivered as aforesaid, by the defendant Clara Bloodgood to the defendant Harriet S. Ludlam, the defendant Henry A. Ludlam was insolvent and was unable to comply with the terms and conditions of the order mentioned and described herein, under and by virtue of which he was ob-

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liged to pay to this plaintiff the sum of One hundred twenty-five (\$125) Dollars monthly, beginning March 11th, 1901, and under and by virtue of which order there was then due and owing to the plaintiff a sum in excess of Three thousand (\$3,000) Dollars, which was then unpaid and past due and that these facts were well known to the defendant Harriet S. Ludlam at said time.

TWENTY-SECOND: Upon information and belief, the said defendant Harriet S. Ludlam has the title to said premises in her name and solely for the benefit and as trustee of the defendant Henry A. Ludlam, who is the real owner thereof.

TWENTY-THIRD: That the plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment as follows:

FIRST: That it be adjudged and decreed that the deed of conveyance made and executed and delivered by one Harry Hansen and his wife, Anna, on or about the 10th day of September, 1907, filed in the office of the Clerk of the County of Kings in Section 16, Block 5194, Liber 3039, page 143, was made, executed and delivered to the said Clara Bloodgood as trustee and for the benefit of the defendant Henry A. Ludlam, pursuant to a void and fraudulent agreement existing between the said defendant Henry A. Ludlam and the said defendant Clara Bloodgood.

SECOND: That the deed made, executed and delivered by the defendant Clara Bloodgood to the defendant Harriet S. Ludlam, filed and recorded in the office of the Register of the County of New York on or about the 6th day of February, 1912, in Section 16, Block 5195, Liber 3352, page 71, is fraudulent and void as against this plaintiff and that the same be set aside and cancelled of record.

THIRD: That a Receiver be appointed to take possession of and collect the rents, issues and profits of the said premises and to sell the same in accordance with the directions of the court and to pay over the proceeds thereof to this plaintiff in payment or part payment of the judg-

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ment herein, whichever the case may be, and to account for the balance, if there be any on hand, according to the order of the court.

FOURTH: That the defendants and each of them be directed to account to the plaintiff for the rents, issues and profits of the said premises in accordance with the decree of the said court herein.

FIFTH: That the plaintiff recover the costs and disbursements of this action, and have such other and further relief in the premises as may be just and proper.

BURNSTINE & GEIST,
Attorneys for Plaintiff,
No. 149 Broadway,
New York City,
Manhattan Borough.

[*Verification.*]

EUDORA S. VAN HORN, Plaintiff, v. FRANK M. VAN HORN
and PATRICK A. HALPIN, Defendants

(Supreme Court, N. Y. Special Term, Part 3, October 21, 1913)

Pleading; complaint; demand for relief; answer; former action pending; action upon an agreement after a previous action for fraud in inducing the making of the agreement

1. Where a defendant has answered the complaint and the plaintiff has demurred to the answer, the demand for relief in the complaint is immaterial as the court can grant any relief which the facts stated warrant.
2. A defense that an action "for substantially the same relief" is pending between the parties is insufficient without a statement of the facts.
3. A defense that the plaintiff had previously brought an action to recover damages for fraud in inducing her to make an agreement, is insufficient to defeat an action upon the same agreement, or upon a decree which embodied the agreement.

4. The fact that the plaintiff may have an adequate remedy at law in the courts of another jurisdiction is no answer to an action in this jurisdiction, even though the present action were to be regarded as an action in equity.

Demurrer to affirmative defenses in answer.
Sustained.

Alexander Thain for the plaintiff.

Osborne, Lamb & Garvan for the defendant Van Horn.

GIEGERICH, J.:

The Nevada divorce having been procured on the ground of desertion, the case does not come within the provisions of § 1772 of the Code of Civil Procedure, and it is doubtless beyond the power of the court to grant the relief demanded in the complaint. But the complainant states facts sufficient to constitute a cause of action at least for alimony past due and unpaid (*Sistare v. Sistare*, 218 U. S. 1) and, the defendant having answered, the demand for relief is immaterial upon demurrer (see *Black v. Vanderbilt*, 70 App. Div. 16; 74 Supp. 1095, and cases there cited). The demurrers must be decided upon a consideration of the pleadings and nothing else. The numerous references in the brief of counsel for the defendant to matters which do not appear either in the complaint or the answer cannot be regarded. The first defense, that an action "for substantially the same relief" is pending between the parties, is obviously insufficient. If there is another action pending between the same parties for the same cause, the facts should be stated. The second defense is also, I think, insufficient. The fact that plaintiff has previously brought an action to recover damages for fraud in inducing her to make the agreement in question ought not to prevent her bringing an action upon the agreement or upon the decree which embodied the agreement. Counsel do not

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cite any authorities which support such a contention, but they do cite an authority to the contrary. *McNaught v. Equitable Life Assur. Soc'y*, 136 App. Div. 774; 121 Supp. 447. The third defense is also insufficient. The fact that the plaintiff may have an adequate remedy at law in the courts of another jurisdiction would be no answer to an action in this jurisdiction, even though this were to be regarded as an action in equity. The point that the case does not come within the provisions of § 1772 of the Code has already been noticed. The fourth defense alleges no further facts and is also demurrable. The fifth defense, that the plaintiff has an adequate remedy in the courts of Nevada, has already been disposed of in considering the third defense, which contains an allegation to the same effect. The demurrers to each of the first five defenses must be sustained, with costs, with leave to the defendant Van Horne to amend his answer within twenty days on payment of costs. Settle decision on notice.

ANTOINETTE F. KLEINE, Plaintiff, v. JOHN DESOLA &
OTHERS, Defendants

(Supreme Court, Kings County Special Term, October 7, 1913)

Judicial sale; referee; following judgment; payment of purchase price

1. A referee to sell under a judgment has no discretion, but must follow the terms of the judgment, and if the purchaser desired to have certain liens credited on the purchase price, which such purchaser is required by the judgment to pay to the referee, this must be accomplished by amendment of the judgment.

Motion to compel referee to accept settlement otherwise than by cash on a judicial sale.

Denied with permission to amend judgment.

William Butcher for the plaintiff.

Alvah W. Burlingame, Jr., referee.

GARRETSON, J.:

The referee's position in this matter is not unreasonable. He has no discretion and must follow the terms of the judgment. Since the plaintiff has purchased at the sale she should furnish in cash to the referee a sufficient amount to pay the disbursements which the referee is required to make and is liable for as well as his fees, and the judgment may be amended so as to enable her to complete her purchase without paying in cash the amount coming to her on account of the amount due for principal and interest, and so that the deed of the referee may, upon her written request, be delivered to her subject to existing taxes, &c., as indicated by me upon the argument. Settle order on notice to the referee and to all parties who have appeared in the action.

HARVEY F. CHUTE, Plaintiff, v. WILLIAM J. KARNES,
Defendant

(City Court of the City of New York, September 11, 1913)

Costs; security; charging costs against plaintiff's attorney personally when security not given

1. When an order requiring a non-resident plaintiff to file security for costs is not complied with, an order is proper charging the costs against the plaintiff's attorney personally where the affidavit on which the order for security was made states the non-residence of the plaintiff positively.

Motion to charge plaintiff's attorney personally with costs.

Granted.

Abram B. Freedman for the plaintiff.

Russell W. Leary for the defendant.

FINELITE, J.:

The order directing the plaintiff to file security for costs pursuant to § 3268 of the Code was not complied with. Therefore, under § 3278, the attorney for plaintiff is personally liable for defendant's costs to an amount not exceeding \$100. The amount of the costs involved in this proceeding is \$28.03. The affidavit on which the order for security was granted sets forth the fact that the plaintiff is a non-resident on positive knowledge and not on information and belief, as plaintiff's attorney contends, and the cases cited by him (*Davidson v. Bose*, 57 App. Div. 212; 68 Supp. 316; *Ulair v. Brown*, 9 How. Pr. R. 270) do not apply. Motion is granted, with leave, however, to pay the same in two installments, the first half to be paid on September 20 and the balance on October 4, 1913, both said payments to be made at the office of the attorney for the defendant. Order signed.

WALTER S. HIATT, Plaintiff, v. HARRY H. FRAZEE, the name Harry being fictitious, true Christian name of defendant being unknown to plaintiff, but desiring to designate a person formerly engaged in the theatrical business, Defendant.

(City Court of the City of New York, June 16, 1913)

Substituted service of summons

1. An order for the substituted service of the summons must be set aside where the affidavit on which it was based stated that a clerk of the plaintiff's attorney had gone to the defendant's office on several occasions and was told he was not in, and that on the last occasion the clerk explained to the person in

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charge that he wished to serve a summons and complaint on the defendant; that the person left the room and on returning asked the name of the plaintiff, which was told by the clerk, and that said person, then leaving the room a second time and on returning said the defendant could not be seen, where no efforts were made to serve the summons on the defendant at his residence, nor was there anything in the affidavit to show where the defendant resided.

Motion to set aside order for substituted service of the summons.

Granted.

McDowell & Kennedy for the plaintiff.

Nathan Burkan for the defendant appearing specially herein.

LUCE, J.:

On June 2, 1913, an order was entered for substituted service of the summons upon the defendant. The affidavit upon which that order was based stated that the deponent, the managing clerk for the plaintiff's attorneys, had had in his possession for service upon the defendant summons and complaint since April 16, 1913, and on that day had twice called at the defendant's office, No. 220 West Forty-eighth street, inquired for the defendant and had been told the defendant was not in; on April 18, April 23, April 24, at 11 A. M., and again at 4.30 P. M., remaining until 6 P. M., and April 30, each time receiving the same reply. On one occasion deponent explained to the person in charge of the room that he only wished to serve a summons and complaint on the defendant; that the said person left the room and, on returning, asked the name of the plaintiff, which was told by the deponent; that said person then left the room the second time and on returning said the defendant could not be seen. The affidavit concludes with the statement that the deponent

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could not get an appointment with the defendant, either at the office address or any other place. The affidavit is silent as to all other efforts made to serve the summons. It is barren of any allegation of the defendant's residence. If a resident of New York County, then an effort to serve the summons at defendant's residence should have been made. If not a resident of New York County, then the defendant's absence from the county would be sufficient. It is quite apparent that the mere fact of the process server's futile attempts to serve the summons while calling at the defendant's office does not establish any satisfactory evidence that the defendant is avoiding service of the summons. He is not shown to be in New York County; nor, on the other hand, is it shown that he does not reside in New York County. The case is so nearly similar to that of *Nichols v. Emmett*, 56 Misc. 321; 107 Supp. 663, that it cannot be distinguished from it. Motion is granted and the order for substituted service of the summons is vacated.

ANTONIO ESPOSITO, Plaintiff, v. JULIUS BIDERMAN, Defendant

(County Court of Kings County, October 27, 1913)

Consolidation of actions in the Municipal Court of the City of New York and the County Court of Kings County; plaintiff in one action defendant in the other.

1. Section 817 of the Code of Civil Procedure authorizing the consolidation of two or more actions in favor of the same plaintiff against the same defendant does not authorize the consolidation of two actions where plaintiff in one of them is the defendant in the other.
2. An action pending in the Municipal Court of the City of

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New York may be consolidated with an action pending in the County Court of Kings County where each action is in favor of the same plaintiff and the same defendant.

Motion for consolidation of actions.

Denied.

Hyman Newman for the plaintiff.

Julius Schwartz for the defendant.

FAWCETT, J.:

A motion is made herein, pursuant to the provisions of §§ 817 and 818 of the Code of Civil Procedure, to consolidate with this action an action pending in the Municipal Court wherein the above named defendant is plaintiff and the above named plaintiff is the defendant. The object of this Code provision is to prevent oppression by the unnecessary accumulation of costs. The defendant opposes the motion for a stay of the Municipal Court action or for a consolidation of the two actions in this court and urges two grounds of objection—first, that the statute applies only to causes where the actions in both courts are in favor of the *same plaintiff* and against the *same defendant*, and not where the plaintiff in one action is the defendant in the other action and vice versa; secondly, the defendant contends that § 818 of the Code refers only to causes pending in the Supreme Court. There is no merit in the second contention. Section 3347 of the Code of Civil Procedure, subdivision 6, expressly makes the statutes relating to consolidation apply to all courts of record. So it has been held that the City Court of the City of New York can remove to itself and consolidate with the suit before it an action pending in the Municipal Court. *Curley v. F. & M. Schaefer Brewing Co.*, 35 Misc. 131; 71 Supp. 318. The provisions of § 3347, subdivision 6, make it unnecessary to consider the argument advanced

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in the plaintiff's brief, that the County Court would have this power under the general provisions of § 348 of the Code, which gives to a county judge the same power and authority in an action in the County Court which a Justice of the Supreme Court possesses in a like action brought in the Supreme Court. It would seem that this is a case where consolidation might be ordered upon the grounds of avoiding unnecessary accumulation of costs and a multiplicity of suits. But I believe that the first objection raised by the defendant must be sustained. It is true that the parties to the two actions are the same and that the causes of action arise out of the same occurrence, yet the language of the Code is expressly "in favor of the same plaintiff against the same defendant." The provisions of § 817 authorize the consolidation of actions against the same defendant and by the same plaintiff, but do not authorize the consolidation of actions where the plaintiff in one action is the defendant in the other. *Waiontha Knitting Co., Lim., v. Hecht & Campe, Inc.*, 58 Misc. 350; 111 Supp. 10; *Miller v. Baillard*, 124 App. Div. 555; 108 Supp. 973. I can find no case or authority which would permit a consolidation under the circumstances existing here. I am therefore constrained to deny the motion. Motion denied, without costs.

LIGHTBOURNE MIDDLETON, Plaintiff, v. LOUISE SPRECKLES, Defendant

(Supreme Court, N. Y. Special Term, Part 1, June 16, 1913)

Deposition; commission to take testimony out of the State; interrogatories; settlement; objections which may be made

1. On the settlement of the interrogatories to be attached to a commission the only objection that can be considered is as to whether or not they are pertinent to the issues as made by the pleadings, and when interrogatories and cross-inter-

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rogatories are presented for settlement and a large number of objections are made thereto on the ground of irrelevancy, immateriality and incompetency, but there is no specific objection of lack of pertinency, the interrogatories will either be settled as proposed or returned to the parties so they can make their own corrections and move for settlement upon objections authorized by the Code.

Motion for settlement of interrogatories.

Lawrence B. Dunham for the plaintiff.

Charles Philip Easton for the defendant.

GIEGERICH, J.:

The only objection that can be considered upon the settlement of interrogatories is that they are not pertinent to the issues. Code, § 892; *Wanamaker v. Megraw*, 168 N. Y. 125; *Spurr & Sons, Inc., v. Empire State Surety Co.*, 122 App. Div. 449; 106 Supp. 1009. In the present case objections are made to fifty-seven of the interrogatories and cross-interrogatories, and irrelevancy, immateriality and incompetency are mingled as the grounds of many of the objections. Some of the objections are conceded to be well taken, and changes in the interrogatories are suggested to meet the objections. The court cannot take the time to study the issues in this action and examine the fifty-seven interrogatories to see whether one or more of them may be open to the objection of lack of pertinency, although that particular objection is nowhere made, and perhaps will not be made when attention is confined to that single point, as it should be on such an application as this. The interrogatories will either be settled as proposed or they will be returned to the parties in order that they may make their own corrections in them and then move for settlement upon objections authorized by the Code. The parties may elect which order they will take and settle the same on notice.

HERMAN COHEN, Plaintiff, v. EDWARD L. HARPER,
Defendant

(Supreme Court, N. Y. Special Term, Part 1, September 2, 1913)

Pleading; complaint; slander; innuendo sufficient to sustain complaint

1. Where words of which complaint are made are not slanderous *per se*, but the plaintiff attempts by innuendo to ascribe an injurious sense to the words used, the complaint must be sustained on demurrer, even though the innuendo is not justified by the alleged slanderous words.

Demurrer to complaint.

Overruled.

Blandy, Mooney & Shipman for the plaintiff.

Henry C. Quinby for the defendant.

DONNELLY, J.:

The words complained of standing alone are not slanderous *per se* (*Torres v. Huner*, 150 App. Div. 798; 135 Supp. 332) and without an innuendo showing the injurious sense in which they were used or an allegation of special damages would be insufficient to sustain the complaint. The plaintiff, however, does attempt by innuendo to ascribe an injurious sense to the words used, and this is sufficient to sustain the complaint on demurrer, even though the innuendo be not justified. *Rossiter v. N. Y. Press Co., Ltd.*, 141 App. Div. 339; 126 Supp. 325; *Nealon v. Frisbie*, 11 Misc. 12; 31 Supp. 856. Demurrer overruled, with leave to defendant to withdraw demurrer and plead over on payment of costs to date.

**MADOLON LE COMPTE, Plaintiff, v. EDWARD LE COMPTE,
Defendant**

(Supreme Court, Kings County Special Term, September 2, 1913)

Separation; alimony when decree of separation is denied

1. Where, in an action for a separation, the court reached the conclusion that the marital difficulties of the parties could not be charged to the fault of either, but were attributable to the abnormal characteristics with which each seemed to be afflicted, it was held that a decree should be made granting alimony in the sum of \$50 per month to the wife and a counsel fee to her attorney, the alimony to be secured by a mortgage on the husband's real estate, even though no decree of separation should be rendered.

Action for a separation.

Madelon Le Compte, attorney in person.

Francis X. McCaffry for the defendant.

SCUDDER, J.:

In specific performance action, judgment for plaintiff, directing defendant to reconvey to plaintiff the properties described in the complaint, without costs. In the separation action, the court has reached the conclusion that the marital difficulties of the parties cannot be charged to the fault of either, but are attributable to the "abnormal" characteristics with which each seems afflicted. This situation presents a proper case in which judgment should be rendered providing for the support of plaintiff without rendering a judgment for separation. Code Civ. Pro., § 1766. Judgment in separation action allowing plaintiff \$50 per month alimony and \$250 counsel fee, the alimony to be secured by mortgage on defendant's real estate. No costs. Settle findings and judgment in each action on notice.

ETHEL M. SAMMIS, Plaintiff, v. SUFFOLK GAS & ELECTRIC
LIGHT Co., Defendant

(Supreme Court, Kings County Special Term, September 8, 1913)

Appeal case; including respondent's exceptions in a case in which the Appellate Division cannot order judgment absolute, on reversal

1. In making up a case on appeal in an action for negligence, where the Appellate Division does not have power, under Code Civ. Pro. § 1317, as amended by L. 1912, c. 380, to grant judgment absolute on reversal, the rulings and exceptions taken by the respondent should not be inserted in the case.

Settlement of case on appeal.

Martin T. Manton for the plaintiff.

Harry S. Austin for the defendant.

KELLY, J.:

I cannot understand why the appellant wishes the exceptions of the respondent inserted in this case, and I have allowed the proposed amendments striking out the exceptions in each case. If this was a suit in equity or a case in which final judgment could be rendered by the Appellate Division under § 1317 of the Code, as amended by Laws, 1912, chap. 380, there might be some reason for inserting the rulings and exceptions taken by the plaintiff, although in that case it would appear to be a matter which should interest the plaintiff more than the defendant. But in a negligence case such as this I do not see how the rule referred to in *Bonnette v. Molloy*, 153 App. Div. 73; 138 Supp. 67, cited by defendant, has any application.

**RICHMOND ASSETS COLLECTING CO., Plaintiff, v. JULES
BACHE et al., Defendants**

(Supreme Court, Kings County Special Term, October 27, 1913)

Deposition; examination before trial; remedy where an ex parte order is less broad than that for which application is made

1. Where the plaintiff has secured an ex parte order for the examination of the defendant, which order is less broad than that applied for, and subsequently moves, upon an order to show cause at Special Term, why an examination of the defendant in the form such as was originally asked for ex parte should not be granted, the motion must be denied if considered as the original application, and must also be denied if it does not appear from the moving papers that the original ex parte order was partly refused, as the court cannot take judicial notice of the former proceedings in such a case, and such refusal of the original application should appear either in the ex parte order originally granted or in the order to show cause subsequently granted, and it is not sufficient that it appears in the affidavit submitted by the moving party.

Motion at Special Term for an order that the defendant be examined before trial.

Ferdinand E. M. Bullowa for the plaintiff.

Wellman & Wellman for the defendant.

GARRETSON, J.:

The plaintiff moves at Special Term for an order that the defendants be examined before trial. It has heretofore obtained an order from a justice of this court ex parte which is less broad than asked for, and with which it is dissatisfied, and which the justice has refused to change by enlarging its scope. But the justice has granted the

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plaintiff an order that the defendants show cause at Special Term why an order for the examination of the defendants in form such as was originally asked for ex parte should not be granted. The Special Term is without power to grant such an order upon an original application (*Heishon v. Knickerbocker Life Ins. Co.*, 77 N. Y. 278; *Wiechers v. New Home Sewing Machine Co.*, 38 App. Div. 1; 56 Supp. 235), but may upon motion vacate or modify such an order made by a justice. The pending motion is in form an original application and the ex parte order is still in force. There is no special significance in the fact that the order to show cause was made by the same justice. It is but a substitute for a notice of motion. Aside from the question of power in the Special Term to entertain such a motion under any circumstances, as, for example, under § 776 of the Code of Civil Procedure, upon the ground that the application for the order ex parte was partly refused, there is nothing to evidence judicial action in that regard. A refusal in part does not appear in the ex parte order or in the order to show cause, but only in an affidavit submitted by the moving party on this motion, which is not sufficient. It is suggested in passing that the plaintiff might avail itself of the provisions of § 1348 of the Code. The motion is denied, with \$10 costs.

ARTHUR KILNER GRIESER, Plaintiff, v. MADGE EASTWOOD
GRIESER, Defendant

(Supreme Court, N. Y. Special Term, Part 1, October 18, 1913)

Disclosing plaintiff's address

1. On a motion to compel the plaintiff's attorney to disclose the plaintiff's address, it was held that the motion should be denied upon the plaintiff filing an admission duly acknowledged by the plaintiff personally of service on him of an order directing the payment of alimony.

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Motion to compel disclosure of plaintiff's address.
Denied conditionally.

Louis O. Condit for the plaintiff.

Almy, Van Gordon, Evans & Kelly for the defendant.

PENDLETON, J.:

Motion for an order to compel disclosure of plaintiff's address and for additional counsel fee denied on plaintiff's filing, within five days from service of a copy of the order entered hereon, an admission duly acknowledged by plaintiff personally of service on him of the order directing the payment of alimony. Leave to renew the motion for additional counsel fee is hereby given if an order for a commission to take testimony is hereafter made on plaintiff's motion.

HERMAN A. METZ, Plaintiff, v. BEN F. HARDESTY, Defendant

(Supreme Court, N. Y. Special Term, Part 1, September 3, 1913)

Motion for judgment on the pleadings; denial of knowledge or information sufficient to form a belief; action by guarantor, who has paid note, on an implied promise of the principal for repayment

1. In an action by a guarantor who has paid a note to recover from the principal on an implied promise of repayment, where the defendant admits that the note was made, executed and delivered by him for a valuable consideration, that it was endorsed and guaranteed by the plaintiff, and that it was not paid at maturity by the defendant or any person in his behalf, a denial of knowledge or information sufficient to form a belief as to the allegations that the plaintiff, as guarantor, has paid the note, is insufficient, especially where it appears from the answer that the defendant has knowledge

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that the bonds which were given as collateral for the note are in the possession of the plaintiff.

Motion by the plaintiff for judgment on the pleadings.
Granted.

O'Gorman, Battle & Vandiver for the plaintiff.

Otterbourg, Steindler & Houston for the defendant.

WEEKS, J.:

This is a motion made by plaintiff for judgment on the pleadings. It is well settled that a guarantor who has paid a note may recover from the principal on an implied promise of repayment. *Brandt on Suretyship and Guaranty*, § 226; 7 Cyc. 1020; 20 Cyc. 1495. The defendant admits that the note was made, executed and delivered by him for a valuable consideration, and that it was indorsed and guaranteed by the plaintiff and that it was not paid at maturity by the defendant or any person on his behalf. The denial of "knowledge or information sufficient to form a belief of the allegations contained in paragraphs fourth and fifth" is not in proper form and is clearly insufficient. *Jurgens v. Wichmann*, 124 App. Div. 531; 108 Supp. 881; *Kirschbaum v. Eschmann*, 205 N. Y. 127. In the language of *Dahlström v. Gemunder*, 198 N. Y. 449-453, "this was not a sufficient or honest denial under the Code." That the defendant in this case actually had information sufficient to form a belief is shown by the allegation in his answer on information and belief (fol. 17) that "the plaintiff has now secured possession of the said bonds," i. e., the bonds deposited as collateral to the stock note which is the basis of this action. "Intentional ignorance is not such as the Legislature had in view when it authorized a defendant to put in issue any allegation of a complaint when he had no knowledge or information as to its truth by stating such ignorance." *Chapman v. Palmer*,

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12 How. Pr. 37. If the defendant had information which led him to believe that the allegations of the complaint were untrue he should have denied the same "on information and belief." He cannot be in possession of information and have a belief as to the truth or falsity of the allegations and at the same time attempt to take advantage of this form of denial. The matter pleaded as a separate defense does not constitute a defense and is not pleaded as a counterclaim, although affirmative equitable relief is prayed for. The motion for judgment on the pleadings is therefore granted, with \$10 costs.

LOUIS LEVY, Plaintiff, v. INDEPENDENT ORDER FREE SONS
OF JUDAH, Defendant

(City Court of the City of New York, September 10, 1913)

Amendment; serving an answer as an amended pleading after a demurrer has been served

1. Where the defendant had served a demurrer to the complaint and before the hearing was had on the demurrer, the defendant served what was called an amended answer, and then the plaintiff brought on the demurrer for argument, it was held that the defendant could not serve an answer to take the place of the demurrer and that as the complaint stated facts sufficient to constitute a cause of action the demurrer should be overruled, with costs, with leave to the defendant to plead over, upon payment of costs.

Demurrer to complaint.

Overruled.

Eugene L. Brisach for the plaintiff.

Leopold Freiman for the defendant.

FINELITE, J.:

It appears from the facts herein that defendant served a demurrer to the complaint. Before the demurrer was

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brought in for hearing the defendant served its answer designating it as an amended pleading. The demurrer was a pleading in itself under the Code which had to be disposed of upon motion or consent to its withdrawal, upon which an order should have been entered granting leave to the defendant to serve an answer in lieu of the demurrer, *Cashman v. Reynolds*, 123 N. Y. 138, all of which defendant has failed to do. The demurrer is overruled for the reason that the complaint states facts sufficient to constitute a cause of action, with costs, with leave, however, to defendant to plead over upon payment of costs. Submit order.

MICHELE D'AMORE and LOUIS LANZETTA, partners doing business under the firm name of D'AMORE & LANZETTA, Plaintiffs, v. THE ACME METAL CEILING COMPANY and others, Defendants

(Supreme Court, N. Y. Special Term, Part 1, October 3, 1913)

Demurrer to counterclaim containing irrelevant denial

1. A demurrer to a counterclaim cannot be defeated because such counterclaim contains an irrelevant denial, as the rule that where a denial is contained in a separate defense, the defense is not demurrable, does not apply to a counterclaim.

Demurrer to counterclaim.

Sustained.

Gordon & Rogers for the plaintiff.

Rudolph Marks, for Adolph Phillip Co.

Philip I. Schick for defendant Acme Metal Ceiling Co.

BURR, J.:

Motion for an order sustaining demurrers to two counterclaims. These counterclaims are based on the rights of

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the defendant under a contract, but these rights are subject to the performance of certain conditions precedent by the defendant. In the absence of allegations that such conditions precedent were performed, or of excuse for their non-performance, it is evident that the counterclaims are insufficient and that the demurrers must be sustained. The defendant appeals to the rule that where a denial is contained in a separate defense the defense is not demurrable. Whatever the rule may be as to separate defenses (see memorandum in *Mitteldeutsche Privatbank v. Bosselman*, handed down simultaneously herewith) I am cited to no authority applying that principle to counterclaims which from their very nature would seem to exclude a denial as totally irrelevant. Motion granted. Motion for an order sustaining the demurrer is granted, with \$10 costs, with leave to defendant to serve an amended answer within fifteen days.

GEORGE J. H. CROWE, as Trustee in Bankruptcy of the Firm of PAPPAS & KARAHALL and of NICHOLAS PAPPAS and PETER KARAHALL, Individually, Respondent, v. THE LIQUID CARBONIC COMPANY, Appellant ¹

(208 N. Y. 396; aff'g 154 App. Div. 373; 139 Supp. 587)

Conditional sale; Personal Property Law, § 65, invalidity of agreement by vendee waiving such provision; leasing of property as a taking thereof

1. An agreement by a vendee waiving the provision of § 65 of the Personal Property Law, to the effect that the vendor

¹ For Complaint from this case see *post*, page 603. For Order of Reversal in the Appellate Division see *post*, page 607. For Judgment of Reversal after the decision of the Appellate Division see *post*, page 609.

This case reached the Court of Appeals after the Appellate Division had reversed the judgment of the Special Term and ordered an affirmative judgment in favor of the plaintiff. The form of the order of

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upon retaking chattels sold under a conditional bill of sale, whereby the title is to remain in the vendor must sell the same within a certain period after such taking, is void as against public policy.

2. Where a soda fountain is sold under a conditional bill of sale and after the vendee becomes bankrupt the vendor leases the same to other parties, such leasing is a retaking within the meaning of the Personal Property Law, § 65, and a sale thereof must be had within the time specified in the statute after such leasing, and in the absence of such sale within such time the vendor is liable to the trustee in bankruptcy of the vendee for the amount paid by such vendee toward the purchase price of the same.

Appeal by the defendant from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 16, 1913, upon an order reversing a judgment in favor of defendant entered upon a decision of the court at a Trial Term, and directing judgment in favor of plaintiff.

T. B. Merchant for appellant.

H. J. Hennessey for respondent.

GRAY, J.:

This action was brought to recover from the defendant the moneys, which it had received upon a contract for the conditional sale of a soda fountain; upon the ground that, after retaking the property, it did not comply with the provisions of the statute governing such sales. The plaintiff is the trustee in bankruptcy of the vendees of the fountain. It was purchased in February, 1909, under a written agreement. The consideration of \$1,885 was to be paid by allowing \$400 for a second-hand soda foun-

reversal and of the final judgment in favor of the plaintiff are therefore appended, as showing the practice under the amendments of the Code of Civil Procedure permitting the Appellate Division to render final judgment in such cases.

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tain; by a cash payment of \$225 and by giving thirty-six promissory notes for \$35 each; representing future monthly installments of payment of the balance of the price. The agreement provided for the retention by the defendant of the title to the property, until the purchase money was paid in full, and, should default be made in the payment of any note, that the defendant, or its agent, or attorney, might take possession of, and remove, such property. It contained this clause: "In that event all money paid under this contract shall be held to have been for the use of said property to the date of such removal and shall be retained by you (defendant). And we hereby agree that it shall not be necessary for you to retain said property for a period of thirty days after retaking, or to sell the same for our benefit; but upon such retaking our right to comply with the terms of this contract and thereupon to receive said property, is expressly waived." In January, 1910, the vendees were adjudged bankrupts; a receiver was appointed of their estates and on February 3rd, 1910, the plaintiff was appointed trustee in bankruptcy. At that time, the first eight of the series of notes had been paid. The ninth note, falling due on February 7th, 1910, was defaulted upon. The bankruptcy schedules included the soda fountain, with a statement of its having been purchased under a contract of conditional sale. It came into the receiver's possession, with other property of the bankrupts, and, subsequently, into that of the plaintiff. At the time of the bankruptcy proceedings, one Baumann had acquired the lease of the bankrupts' premises and, under the provisions of a chattel mortgage made by the bankrupts, covering some fixtures in the building, but not the soda fountain, he took possession of the mortgaged property; continuing the business in which the bankrupts had been engaged. Upon the plaintiff's appointment as trustee in bankruptcy, the defendant's attorneys, with its knowledge and consent, leased the soda fountain to Baumann from month to month, till June 1st, 1910, for the

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sum of \$15 a month; when the defendant refused to make any further lease and removed it from Baumann's store. Then, retaining it for a period of thirty days, and on July 26th, the defendant sold it at public auction for a sum less than the amount then due from the vendees under the contract of sale. Thereafter, this action was brought by plaintiff to recover the amount that had been paid on the contract; pursuant to § 65 of the Personal Property Law. When the case came on for trial, at a Trial Term of the court, both parties moved for the direction of a verdict; the jury was discharged and decision was reserved. Subsequently, a decision was rendered, finding facts as they have been stated, and holding, as conclusions of law, that the leasing by the defendant of the property was not a retaking of the same and that it was entitled to judgment against the plaintiff. Upon the plaintiff's appeal to the Appellate Division, that court, by a divided vote of its justices, reversed the judgment entered in favor of the defendant, upon the law and the facts, and ordered a final judgment for the plaintiff for \$905, and interest; that sum being the amount which had been paid upon the contract. The justices of the Appellate Division appear to have divided in opinion upon two questions: *first*, whether there had been a retaking and disposition of the property by the defendant pursuant to the provisions of § 65 of the Personal Property Law, regulating contracts of conditional sales, and, *second*, whether the agreement of waiver, contained in the contract of sale, was against public policy and, therefore, ineffectual. These are the two questions of importance for our consideration.

We think that the determination made by the Appellate Division was correct and that the order appealed from should be affirmed. There was no dispute as to any material question of fact. In reversing upon the facts and the law, the order of the Appellate Division must be regarded as holding, simply, that the plaintiff, and not the

defendant, was entitled to recover upon the facts found and, concededly, undisputed. No other questions have been presented by the defendant and appellant than those which have been mentioned, as dividing the judgment of the Appellate Division justices.

Section 65 of the Personal Property Law (Cons. Laws, chap. 41), provides that "whenever articles are sold upon the condition that the title thereto shall remain in the vendor, or in some other person than the vendee, until the payment of the purchase price, or until the occurrence of a future event or contingency, and the same are retaken by the vendor, or his successor in interest, they shall be retained for a period of thirty days from the time of such retaking, and during such period the vendee, or his successor in interest, may comply with the terms of such contract and thereupon receive such property. After the expiration of such period, if such terms are not complied with, the vendor, or his successor in interest, may cause such articles to be sold at public auction. Unless such articles are so sold within thirty days after the expiration of such period, the vendee or his successor in interest may recover of the vendor the amount paid on such articles by such vendee or his successor in interest under the contract for the conditional sale thereof."

We think that when the defendant, through its attorneys, leased the fountain to Baumann, there was a retaking by the vendor of possession of the property sold. The time had come when, under the contract of sale, it was optional for the defendant to exercise its privilege under the contract and to retake the possession of the fountain. Such a retaking was not, necessarily, confined to a physical removal to the defendant's premises. In exercising an act of ownership, which was inconsistent with its possession by the vendees, or their successor, the plaintiff, the defendant asserted its right to possession of the property; the title to which had remained in it subject to the condition of payment of the price. The argument that

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the property was in the custody of the law at the time and, therefore, could not be retaken by the defendant, is untenable. It was not in the custody of the law, as if taken and held under some legal process, which would hinder the defendant from acting under the contract. It is true that the plaintiff, as the trustee in bankruptcy proceedings, had succeeded to the possession of the fountain, with all other property and assets of the bankrupt; but his possession was subject to all valid claims, liens and equities affecting the same. Though vested by operation of law with the title of the bankrupts, he took their assets, not as would an innocent purchaser, but as the bankrupts held them. He could not oppose the defendant's retaking possession of this fountain; though he could enforce any right reserved to the vendees by the statute, which was violated in the manner of the retaking of possession. The question is in no wise affected by the physical removal on June 1st. Possession had been taken and the result of the summary proceedings by the defendant's attorneys, in leasing the fountain, was to forfeit the moneys paid by the vendees. The defendant did not comply with the provisions cited from the statute, which, had it done so, would have confirmed in it the right to retain the moneys paid.

Upon the second of the two questions presented, whether the express waiver in the contract was effectual, we hold that it was not, because inconsistent with the public policy which the legislative act manifested. The provisions of § 65 of the Personal Property Law, hereinbefore given, are unqualified in their terms. The language, "whenever articles are sold upon the condition that the title shall remain in the vendor * * * until the payment of the purchase price * * * and the same are retaken by the vendor," etc., is comprehensive of every such transaction. The legislative purpose was in the direction of promoting the public good, in mitigating the possible harshness of such a contract by preserving some right to

Opinion of the Court

a vendee, and, if originally, as part of the former Lien Law, perhaps, having more especial reference to waivers in contracts for the sale of household furniture and certain other articles of a household nature, the statute has been so changed by amendment as to read in its present unqualified form. However designed, in the general purpose, to afford some equitable protection against the improvidence and misfortune of the poor, or necessitous, it is for the legislature, not for the court, to restrict the general operation of the act. In *Roach v. Curtis* (191 N. Y. 387, 391), in speaking of a clause in such a contract, which permitted the vendors to dispose of the retaken goods at private sale, Judge WILLARD BARTLETT, delivering the opinion of this court, doubted "whether such a modification is consistent with public policy." It was unnecessary to decide the precise question; but he approved of Mr. Justice SPRING's opinion, at the Appellate Division, as "aptly" pointing out, "if the vendors in a contract of conditional sale can deprive the vendee of the privileges accorded to him under the Lien Law * * * the practical benefits intended to be secured to the vendee by the statute can readily be nullified."

As the facts could not be changed upon a new trial and the facts found showed the exact amount, which had been paid on the fountain by the vendees, the Appellate Division, properly, ordered final judgment for the plaintiff for that amount, with interest.

The order and judgment appealed from should be affirmed.

CULLEN, Ch. J., WILLARD BARTLETT, CHASE, CUDDEBACK, HOGAN and MILLER, JJ., concur.

Order and judgment affirmed, with costs.

Complaint

Form No. 54

Complaint; Conditional Sale; Action by Trustee in Bankruptcy under § 65 of the Personal Property Law for Failure of the Vendee to Sell the Property Within the Time Specified in the Statute after Retaking the Same.¹

Supreme Court, Broome County.

George J. H. Crowe, as Trustee
of the Estates of Pappas &
Karahall, a co-partnership,
and Nicholas Pappas and
Peter Karahall, individuals,
bankrupts,

Plaintiff,

against

The Liquid Carbonic Company,
Defendant.

The plaintiff alleges upon information and belief the following facts, constituting his cause of action herein.

FIRST

That on or about January 20th, 1910, a petition in voluntary bankruptcy was duly filed by Nicholas Pappas and Peter Karahall, as individuals, and also as co-partners comprising the co-partnership of Pappas & Karahall, in the District Court of the United States for the Northern District of New York, and thereafter and on or about January 21st, 1910, the said Nicholas Pappas and Peter Karahall, individuals, and the said firm of Pappas & Karahall, a co-partnership, consisting of the said Nicholas

¹ From *Crowe v. The Liquid Carbonic Co.*, 208 N. Y. 396; aff'g 154 App. Div. 373; 139 Supp. 587. See *ante*, page 596. For Order of Reversal in the Appellate Division see *post*, page 607. For Judgment of Reversal see *post*, page 609.

Complaint

Pappas and Peter Karahall, were, and each of them was, duly adjudicated a bankrupt. That thereafter all matters in said bankruptcy proceeding were duly referred to Benjamin Baker, Esq., one of the Referees in bankruptcy for the Northern District of New York.

SECOND

That at the first meeting of creditors in the said proceeding, held at the office of the said Referee in the City of Binghamton, N. Y., on or about the 3d day of February, 1910, this plaintiff was duly elected and appointed trustee in bankruptcy of the estates of said bankrupts. That plaintiff thereupon filed his bond, which was duly approved by said Referee and plaintiff in all respects duly qualified as such trustee, entered upon the discharge of his duties as such trustee and at all times since has been, and now is, acting as such trustee.

THIRD

That Pappas & Karahall hereinbefore and hereinafter mentioned was a co-partnership engaged in business in the City of Binghamton, Broome County, New York, composed of Nicholas Pappas and Peter Karahall, both of whom were, and now are, residents of the City of Binghamton, Broome County, New York. .

FOURTH

That the defendant is a foreign corporation by the name and style of The Liquid Carbonic Company, duly incorporated and existing under and by virtue of the laws of the State of Illinois. That the said defendant is and at all of the time and times hereinafter mentioned was engaged in business within the State of New York, and said defendant did, previous to the times hereinafter mentioned, file its statement and certificate as required by law to obtain consent, and did obtain consent, of the Secretary of State of the State of New York, to do and transact business within the State of New York.

Complaint

FIFTH

That on or about the 13th day of February, 1909, at Binghamton, N. Y., the defendant, as vendor, did make and enter into a certain written conditional contract for the sale of certain goods and chattels, to wit, a soda fountain and apparatus with the appurtenances thereunto belonging and thereunto appertaining, with the said firm of Pappas & Karahall, and thereafter and on or about May 1st, 1909, said soda fountain and apparatus with the appurtenances were duly delivered to the said firm of Pappas & Karahall, at Binghamton, N. Y., by the defendant, and were duly accepted by the said firm of Pappas & Karahall, all under the said written conditional contract aforesaid.

SIXTH

That it was expressly agreed by and between the said defendant and the said firm of Pappas & Karahall, and it was expressly provided, among other conditions, in the said written conditional contract of sale aforesaid, that the title to and the ownership of the said soda fountain and apparatus with the appurtenances should remain in the said vendor, the defendant herein, until the said soda fountain, apparatus and appurtenances were fully paid for and until all notes or any judgment recovered on account of the said notes or the purchase price should have been fully paid.

SEVENTH

That the contract price of the said soda fountain, apparatus and appurtenances was the sum of eighteen hundred and eighty-five dollars (\$1,885), and the said firm of Pappas & Karahall, after the making of the contract aforesaid, and before the retaking of the said chattels as hereinafter set forth, did pay to the defendant to apply upon said purchase price of the said chattels the sum of nine hundred five dollars (\$905), which said sum was paid

Complaint

partially in money and partially by certain goods, wares and merchandise which were delivered to the defendant and received and accepted by the defendant as of the value of four hundred dollars (\$400).

EIGHTH

That thereafter and on or about February 1st, 1910, said defendant and its agents and attorneys did, at Binghamton, N. Y., retake the said soda fountain, apparatus and appurtenances, under and by virtue of the aforesaid written conditional contract; that after retaking said soda fountain, apparatus and appurtenances as aforesaid, said defendant did not retain the same for a period of thirty days, but did during said thirty days let, lease and rent the said soda fountain, apparatus and appurtenances to one Frederick J. Baumann for a period of one month; that after the retaking of the said soda fountain, apparatus and appurtenances as aforesaid, and after the expiration of the thirty days following such retaking, said defendant did not, within the next thirty days, sell said soda fountain, apparatus and appurtenances at public auction.

NINTH

That by reason of the foregoing facts, and under and by virtue of, and by reason of, Chapter 418 of the Laws of 1897 of the State of New York, together with the acts amendatory thereof and supplementary thereto, and under and by virtue of and by reason of the provisions of §§ 60, 62, 65, 66 and 67 of the Personal Property Law of the State of New York, being a portion of Chapter 41 of the Consolidated Laws of the State of New York, the defendant became indebted, on or about April 1st, 1910, to this plaintiff in the sum of nine hundred five dollars (\$905), being the amount paid by said firm of Pappas & Karahall aforesaid, to apply upon the purchase price of the said soda fountain, apparatus and appurtenances, under the contract for the conditional sale thereof.

Order

TENTH

That prior to the commencement of this action an order was duly made by Benjamin Baker, Esq., Referee in Bankruptcy, as aforesaid, authorizing and directing this plaintiff to institute and maintain this action.

WHEREFORE the plaintiff demands judgment against the defendant in the sum of nine hundred five dollars (\$905) with interest thereon from April 1st, 1910, besides the costs of this action.

H. J. HENNESSEY,
Attorney for Plaintiff,
10 and 11 McNamara Block,
Binghamton, N. Y.

[Verification.]

Form No. 55

Order; Conditional Sale; Action by Trustee in Bankruptcy under § 65 of the Personal Property Law for Failure of the Vendee to Sell the Property Within the Time Specified in the Statute after Retaking the Same.¹

Supreme Court, Appellate Division, Third Department.

George J. H. Crowe, as Trustee of
the Estates of Pappas & Kara-
hall, a co-partnership, and
Nicholas Pappas and Peter
Karahall, individuals, bank-
rupts,

Appellant,
against
The Liquid Carbonic Company,
Respondent.

The appeal in the above-entitled action having been heard at this term,

¹ From *Crowe v. The Liquid Carbonic Co.*, 208 N. Y. 396; aff'g 154 App. Div. 373; 139 Supp. 587. See *ante*, page 596. For Complaint in

Order

Now, on motion of H. J. Hennessey, attorney for appellant, after hearing T. B. & L. M. Merchant, attorneys for respondent, it is

ORDERED: (HOUGHTON, J., and LYON, J., dissenting),

FIRST: That the judgment entered in this action in the office of the Clerk of the County of Broome on the 12th day of April, 1912, be and the same is wholly reversed, upon the law and facts, with costs of this appeal to the appellant.

SECOND: That the fourteenth and fifteenth findings of fact contained in the decision of the Trial Court herein are hereby disapproved of, and reversed, upon the ground that there is no evidence tending to sustain such findings.

THIRD: Final judgment is hereby directed to be entered for the plaintiff against the defendant for the sum of nine hundred and five dollars (\$905), with interest thereon from April 12, 1912, with costs to plaintiff in the court below.

JOSEPH H. HOLLANDS,
Clerk.

[Seal.]

this case see *ante*, page 603. For Judgment of Reversal, see *post*, page 609.

Judgment of Reversal

Form No. 56

Judgment of Reversal; Conditional Sale; Action by Trustee in Bankruptcy under § 65 of the Personal Property Law for Failure of the Vendee to Sell the Property Within the Time Specified in the Statute after Retaking the same.¹

Supreme Court, Broome County.

George J. H. Crowe, as Trustee
of the Estate of Pappas &
Karahall, a co-partnership,
and Nicholas Pappas and Peter
Karahall, individuals, bank-
rupts,

against

The Liquid Carbonic Company.

The plaintiff having appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York, from the judgment entered in this action in the office of the clerk of the county of Broome on the 12th day of April, 1912, in favor of the defendant and against the plaintiff, dismissing the complaint upon the merits and for costs \$60.37, and said appeal having been duly heard and an order of said Appellate Division having been made and entered reversing said judgment, upon the law and facts, as well as the fourteenth and fifteenth findings of fact contained in the decision of the Trial Court herein, and directing final judgment to be entered for the plaintiff for \$905.00, with interest thereon from April 12, 1912, with costs of said appeal and of the Trial Term, and a certified copy of said

¹ From *Crowe v. The Liquid Carbonic Co.*, 208 N. Y. 396; aff'g 154 App. Div. 373; 139 Supp. 587. See *ante*, page 596. For Complaint from this case see *ante*, page 603. For Order of Reversal, see *ante*, page 607.

Judgment of Reversal

order attached to the original papers upon which said appeal was heard having been duly transmitted to the Clerk of Broome County and filed and entered in his office on January 16, 1913, and the plaintiff's costs of said appeal and of the Trial Term having been duly taxed and adjusted at the sum of \$235.06.

Now, on motion of H. J. Hennessey, attorney for the plaintiff and appellant, it is hereby

ADJUDGED, that the judgment entered in this action in the office of the Clerk of Broome County on April 12, 1912, be and the same is hereby wholly reversed upon the law and facts, that the fourteenth and fifteenth findings of fact contained in the decision of the Trial Court herein are disapproved of and reversed upon the ground that there is no evidence tending to sustain such findings, and it is

FURTHER ADJUDGED, that the plaintiff recover final judgment against the defendant herein for \$945.33, together with the sum of \$235.06, costs of said appeal and of said Trial Term, amounting in all to \$1,180.39, and have execution therefor.

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M. B. TABER,
Dep. Clerk.

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